Supreme Court, U.S.
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In The

Supreme Court of the United States

W. M. BRELSFORD, *et al.*,

Petitioners,

v.

RUTTER & WILBANKS CORP., MARGARET ANN AINSWORTH, AND SHELL OIL COMPANY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Are Objectors at a class action settlement hearing denied due process of law under the Fifth Amendment to the U.S. Constitution or the right to a meaningful certification and approval process under Rule 23 of the Federal Rules of Civil Procedure when, in accordance with Tenth Circuit precedent (on which the circuits are deeply divided), the district court employs summary judgment type procedures and so limits the hearing that Objectors are denied: (a) the right to present testimony, (b) the right to cross-examine witnesses, (c) the right to present rebuttal evidence, and (d) the right to conduct discovery, even though the hearing is conducted in connection with a pre-certification settlement and there are disputed issues of fact on the adequacy of class representation and the fairness of the settlement?

II. Did the courts below err in certifying the class and approving the settlement when the class representatives and class counsel had serious conflicts of interest that prevented adequate representation of the class; when the settlement was not fair, reasonable and adequate; when there were structural indicia of collusion in the settlement, including an unjustified premium for the named plaintiffs; and when allocation of the settlement proceeds was made among members of the class with admittedly conflicting interests without separate representation of the disparate groups, contrary to this Court's decision in *Amchem Prod. v. Windsor*?

III. Did the courts below err in approving a class action settlement that was contingent on the settlement of an individual action where the settlements were all

QUESTIONS PRESENTED – Continued

negotiated by the same counsel, contrary to this Court's decision in *Ortiz v. Fibreboard Corp.*?

IV. Did the courts below err in not applying heightened scrutiny to the pre-certification class action settlement in this case?

V. A reverse auction occurs where there are overlapping class actions involving the same or similar allegations in different jurisdictions with separate counsel in each case and defendants are able to exploit the competing posture of the cases by settling with the attorneys willing to accept the lowest bid. Did the Tenth Circuit legitimize collusive reverse auctions that are arising with increasing frequency in class action litigation when it ruled, mistakenly, that competing class actions could never be settled if challenges to the collusiveness of the reverse auction were allowed?

LIST OF PARTIES

PETITIONERS – OBJECTORS:

W. M. Brelsford

Lucinda Davis

Judith Walker Funk

Peggy B. Stuart

Bruce Tefft

Charles Butler

Reed Gilmore and W.H. Gilmore, Jr., in their representative capacities as Co-Executors of the Estate of W.H. Gilmore, Sr.

Reed Gilmore and W.H. Gilmore, Jr., in their representative capacities as Co-Executors of the Estate of Dorothy R. Gilmore

Antelope Energy Co., LLC

Antelope Production Co.

William G. Kemp and Marie J. Bench, in their representative capacities as co-Trustees of the Bernard M. Bench Family Trust

RESPONDENTS – PLAINTIFFS (THE RUTTER & WILBANKS CASE):

Rutter & Wilbanks Corp.

Elliott A. Riggs

William R. Thurston, Trustee

Gordon Tanner

Walter K. Arbuckle Trust

LIST OF PARTIES – Continued

Eric B. Wells

Kevin C. Wells

Charles R. Wiggins

Ken Kamon

RESPONDENTS – DEFENDANTS:

Shell Oil Company

Shell Western E&P, Inc.

Mobil Oil Corporation

Mobil Producing Texas & New Mexico, Inc.

Mobil Exploration & Producing, U.S., Inc.

Exxon Mobil, Inc.

Cortez Pipeline Company, a partnership

Shell CO_2 Company, Ltd., a Texas limited partnership

Kinder Morgan CO_2 Company, a Texas limited partnership

RESPONDENTS – PLAINTIFFS (THE AINSWORTH CASE):

Margaret Ann Ainsworth

Charles M. McAfee & Company

Dorothy Gail Chappell

John Larry Clark

Nelda Lee Barlow

LIST OF PARTIES – Continued

Troy M. Oliver

Shorlene Oliver

Poverty Point Properties, L.P.

John H. Miller

Dee Renay

Hazel J. Neely

Ingrid Joann Hartley

Olivia Carson, LLC

Ina F. Gray

Barbara E. Glazner

John H. Glazner

Clara Cundiff

Estate of Velma Louise Henderson

Louis M. Gray

Kip E. Makeever

Edith Delight James

Laura H. Kennedy

Charles R. Wiggins

Elva Gorsuch

Ken Kamon

Jerry Chaffin

Dorothy Chaffin

LIST OF PARTIES – Continued

Johnnie E. Duran

Victor Duran

LeRoy Oliver

J. Ellen Oliver

Wanda Heathman

Idene Minchin

Eric B. Wells

Kevin C. Wells

Wood Oil Company

RESPONDENTS-DEFENDANTS:

(Same defendants as Rutter & Wilbanks case)

STATEMENT PURSUANT TO RULE 29.6

Petitioner (Objector below) Antelope Energy Co., LLC states that it is a limited liability company and has no stock and no corporate parent.

Petitioner (Objector below) Antelope Production Co. is a partnership in the process of dissolving.

The other Petitioners (Objectors) are either individuals or executors of estates.

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John Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343 (1995) ...18, 27

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in the above entitled proceeding on December 24, 2002.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 314 F.3d 1180 (10th Cir. 2002) and is reprinted in the Appendix at A-1. The district court's findings of fact and conclusions of law are not reported and are reprinted in the Appendix at A-21. The judgments and orders of the U.S. District Court for the District of Colorado are reprinted at A-50-123.

JURISDICTION

The judgment of the Court of Appeals was entered on December 24, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the U.S. Constitution is set forth in the Appendix at A-124.

STATEMENT OF THE CASE

A. The Colorado Actions.

This is an appeal from the district court's approval of a class action settlement in two related cases, Nos. 02-1220 (the *Rutter & Wilbanks* case) and 02-1221 (the *Ainsworth* case). The plaintiffs in both cases sought damages for underpayment of royalties on CO_2 gas pumped from wells in the McElmo Dome Unit in Colorado and transported through the Cortez Pipeline to mature oil fields in West Texas where the CO_2 was injected to increase oil production. Plaintiffs complained that the defendants had manipulated the price of CO_2 by inflating the pipeline tariff on the Cortez Pipeline and depressing the price paid for CO_2 in Texas, resulting in reduced royalty payments.

Plaintiffs in the Colorado actions fell into three separate groups: the small share working interest owners ("SSWIOs"), the royalty interest owners ("RIOs"), and the overriding royalty interest owners ("ORRIs"). Plaintiffs' first suit was brought as a class action in Colorado district court in October 1996, on behalf of a Coalition of SSWIOs, ORRIs and RIOs (the "Coalition lawsuit"). The district court denied motions for class certification in that case on two occasions.

In September 2000, the plaintiffs in the original Coalition lawsuit dropped the class action claims and proceeded as an individual action on behalf of the 76 members of the Coalition. The Coalition's lawyers also filed three separate class actions in Colorado district court: one on behalf of the SSWIOs ("*Watson*"); one on behalf of the RIOs ("*Ainsworth*"); and another on behalf of the ORRIs ("*Rutter*"). In February 2001, the plaintiffs in all three class actions moved for class certification, but no ruling was made on the motions.

B. The Texas Cases.

In December 1999, after the class action had been twice denied in the Coalition lawsuit in Colorado, a group of ORRIs represented by Texas counsel filed a class action in Texas state court against the same defendants as were sued in the Coalition lawsuit (the "*Shores*" lawsuit). The lead claim in *Shores* was that the defendants were not entitled to deduct from the royalty payments *any* costs of transporting the CO_2 to West Texas. This claim is called the "no transportation" claim and was never asserted in any of the four Colorado lawsuits. In December 2000, the trial court certified a nationwide class action in *Shores*. In March 2001, a class action on behalf of the RIOs was filed in Texas against the same defendants (the "*Ragland*" lawsuit). *Ragland* was also certified as a nationwide class action.[1]

The defendants in the Texas cases filed interlocutory appeals of the two class certification orders. Before the court of appeals reached the merits, the defendants moved to abate those appeals pending resolution of the present appeal. The Texas appeals have been abated (but not dismissed), pending the outcome of this case.

C. Post-Settlement Proceedings in the Colorado Actions.

In September 2001, the plaintiffs and defendants signed a settlement agreement encompassing all four of the Colorado cases and included the "no transportation"

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[1] Because the SSWIOs charged the transportation costs to the RIOs and ORRIs, Texas counsel believed that the interests of the SSWIOs were antagonistic to the interests of the RIOs and ORRIs. Therefore no Texas case was filed on behalf of the SSWIOs.

claim in the settlement. This settlement followed shortly after the Colorado Supreme Court's seminal decision in *Rogers v. Westerman Farm Co.*, 29 P.3d 887 (Colo. 2001) in which a unanimous court held that if gas is not marketable where it is removed from the ground, then the oil companies cannot deduct from their royalty payments the cost they incur in transporting the gas to market. Because there is no market for CO_2 at the McElmo Dome Unit, *Rogers* greatly strengthened the "no transportation" claim that was featured in the Texas cases, but had no impact on the Colorado cases where a "no transportation" claim had not been pleaded.

Upon signing the settlement agreement, plaintiffs and defendants filed a joint motion in the Colorado district court seeking preliminary approval of the settlement. Petitioners (hereafter "Objectors") had learned from defense counsel even before that motion was filed that a settlement in principle had been reached in the Colorado actions, and Objectors filed motions to intervene in the cases and motions asking the Colorado court to abstain in deference to the previously certified class actions in Texas. Both motions were denied. A-70-76 and 55-59.

Following a preliminary hearing to approve the settlement, from which Objectors were excluded, the district court, in December 2001, conditionally certified the three classes, preliminarily approved the settlement, and appointed a fairness expert. A-60-69.

Thereafter, Objectors filed detailed written objections to the proposed settlement. (R. 1614-80). Objectors sought leave to take expedited discovery and requested a status conference regarding the procedures to be used at the fairness hearing. Both requests were denied. A-70-76. At the district court's request, Objectors then filed a proposal

for the presentation of live witnesses at the fairness hearing. This too was denied. A-80, 85.

Before the final fairness hearing, the court allowed Objectors to file written proffers and affidavits, A-80, 85, but subsequently denied them the right to file rebuttal affidavits in response to affidavits filed by the fairness expert and class counsel. A-87-88. The court also prohibited Objectors from cross-examining the fairness expert and limited them to submitting written questions for the court to ask the fairness expert at the hearing, most of which were never asked. A-80, 85.

At the final fairness hearing in April 2002, the district court heard no sworn testimony (or indeed at any time throughout the entire settlement approval process). The court permitted only oral argument by counsel for plaintiffs and defendants and a presentation by the fairness expert.[2] A-125-206. The fairness expert agreed with all aspects of the proposed settlement, except that he recommended the reallocation of $1.2 million from the named plaintiffs to the class members. A-129, 178. Objectors were precluded from having any role at the settlement hearing other than allowing their counsel to speak for five minutes at the end of the hearing after the court had already announced its decision to approve the settlement. A-185-86, 186-92.

In rendering its decision, the district court certified the settlement class, approved the settlement ($50.4 million in cash and $21.4 million in alleged future relief), approved the reallocation of the settlement proceeds as

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[2] The Tenth Circuit erroneously stated that the fairness expert "testified" at the fairness hearing. A-12. The record shows that the fairness expert's statements at the hearing were not under oath. A-178-85.

recommended by the fairness expert (including a 300% premium for the class representatives and named plaintiffs), and approved $18 million in attorneys' fees for class counsel. A-194-97, 35-39, 50-54. Thereafter, the district court entered findings of fact and conclusions of law taken verbatim from proposed findings and conclusions jointly proposed by plaintiffs and defendants. A-21-49. The court then entered judgments in each of the cases which contained Rule 54(b) certifications authorizing immediate appeals. A-89-123.

Objectors appealed to the Tenth Circuit. The Tenth Circuit affirmed in all respects. This Petition followed.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Presents Issues of Great Importance to the Proper Administration of Class Actions.

This case raises important issues concerning basic procedural requirements under the due process clause and Rule 23 for the conduct of class action settlement hearings. The overwhelming number of cases filed in the federal courts are resolved through settlement. One study found that 83% of the cases in which a class was certified ended in settlement and of these 67% were certified by stipulation or for settlement purposes only. Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 Neb. L. Rev. 646, 709 (Chart B) (1994).

Class actions can also involve millions of people. *See, e.g., Malchman v. Davis*, 706 F.2d 426 (2nd Cir. 1983) (13 million class members). With the rights of so many litigants affected every year by class action settlements, the constitutional sufficiency of class action hearings approving such settlements is vital to the proper administration

of civil justice throughout the United States. Yet this Court has never addressed the minimum procedural requirements for such hearings. This legal uncertainty is aggravated by a split among and within the circuits on the procedural rights of objectors at class action settlement hearings (*see* discussion, Section II, *infra*), an issue not addressed in this Court's recent decision in *Devlin v. Scardelletti*, 536 U.S. 1 (2002), granting objectors at such hearings the right to appeal. Accordingly, there is a pressing need for this Court to address the procedural fairness of the process by which class action settlements are approved in order to ensure that the due process rights of countless litigants are not compromised each year by settlements that are subject to constitutionally inadequate review, as occurred in this case.

This Court recognized in *Phillips Petroleum v. Shutts*, 472 U.S. 747, 812 (1985) that "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class." Important as this right to "opt-out" may be, it is no substitute for and will not cure the harm of a collusive and unfair settlement because in most cases the cost of litigating the claim in an individual action is prohibitive. *See In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1136 (7th Cir. 1979) ("The letters of those subclass members who objected to the settlement proposal illustrate the illusory value of the right to pursue their claims individually."). Accordingly, the constitutional adequacy of the class action hearing at which the fairness of the settlement is judged is as important, if not more important, to absent class members than their right to "opt-out" of the settlement.

A constitutionally adequate settlement hearing is also essential to protect the right to adequate representation

guaranteed in *Shutts*. Due process requires "that the named plaintiff at all times adequately represent the interest of the absent class members." *Shutts*, 472 U.S. at 812. Without an adequate settlement hearing (particularly where there has been no prior class certification), the right to adequate representation is easily compromised. Indeed, this Court is presently considering *Dow Chemical Co. v. Stephenson*, No. 02-271, in which the finality of a class action settlement is under collateral attack for inadequate representation. That case only emphasizes the importance of a constitutionally adequate certification and settlement hearing in the first instance.

The danger of inadequate representation is particularly acute in pre-certification settlements. *See* Downs, *supra*, at 690 ("Extensive violations of Rule 23(a) and due process occurred where certification and settlement were combined. . . ."). Because this case involves a pre-certification settlement in which Objectors challenged the adequacy of representation and because the hearing afforded Objectors was so minimal, this case presents an ideal vehicle for determining what process is due objectors at a pre-certification settlement hearing under the due process clause and/or under Rule 23.

A. The Requirements of Procedural Due Process and Rule 23.

Due process is a flexible concept that adapts procedures to the circumstances of the particular case. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). However, it is not without substance. As this Court stated in *Bell v. Burson*, 402 U.S. 535, 541-42 (1971), "[t]he hearing required by the Due Process Clause must be 'meaningful.'" Under this Court's cases, the extent to which

due process must be afforded the recipient "depends upon whether the recipient's interest in avoiding . . . loss outweighs the government's interest in summary adjudication." *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970). In this case, Objectors stood to lose the right to a full trial on the merits of their claims if the settlement were approved, and since the case involved a judicial proceeding between private parties, there was no countervailing governmental interest in summary adjudication to be considered. Thus, the Tenth Circuit should have recognized that due process required an evidentiary hearing with the right to present evidence and cross-examine witnesses on relevant and disputed issues of fact.

The Tenth Circuit, however, engaged in no such reasoned analysis. Instead, it relied on its own prior decision in *Jones v. Nuclear Pharm., Inc.*, 741 F.2d 322, 325 (10th Cir. 1984) for the conclusory proposition that "[a]n objecting shareholder is not entitled, as a matter of right, to an evidentiary hearing during a settlement hearing." A-14, *infra*.

The problem with this *ipse dixit* is that it ignores decisions from this Court which strongly suggest that objectors do have a right to an evidentiary hearing before a settlement is approved if there are fact issues in dispute. In *Jenkins v. McKeithen*, 395 U.S. 411, 429 (1969), this Court stated that "[t]he right to present evidence is, of course, essential to the fair hearing required by the due process clause." In a class action case involving a hearing to approve a consent decree, this Court stated that "an intervenor is entitled to present evidence and have its objections heard." *Local No. 93, Int'l Assoc. of Firefighters AFL-CIO, C.L.C. v. City of Cleveland*, 478 U.S. 501, 529 (1986). More recently, this Court stated that in a fairness

hearing "the settling parties must present not only their agreement, but evidence . . . *with support in findings of fact following a proceeding in which the evidence is subject to challenge.*" *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 849 (1999) (emphasis added).

This Court has been even more emphatic with respect to the fundamental right to cross-examine witnesses. In *Goldberg*, the Court stated in deciding that welfare recipients had a right to an evidentiary hearing before losing their benefits that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine witnesses." 397 U.S. at 269. This right is important in cases involving documentary evidence, but "it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who [might have improper motives]." *Id.* at 497; *see also Wilner v. Committee on Character and Fitness*, 373 U.S. 96, 103 (1963).

Under this Court's precedents, the circumstances of this case clearly required a more "meaningful" hearing to satisfy due process than the district court allowed. To begin with, the hearing in this case involved *both* class certification and the fairness of the settlement since Objectors had specifically challenged the propriety of class certification. (R. 1614). Under these circumstances, the court had an independent duty to determine whether the requirements for class certification were met before considering the fairness of the settlement. *See Amchem Products v. Windsor*, 521 U.S. 591, 619-623 (1999); *General Motors Corp. Pickup Truck Fuel Tank Products Liability Litig.*, 55 F.3d 768, 795 (3rd Cir. 1995). In making that determination, the court should have held an evidentiary hearing. *See Morrison v. Booth*, 730 F.2d 642, 643 (11th Cir.

1984) (evidentiary hearing required on class certification where issues are complex). Objectors had alleged that "Plaintiffs' counsel and the class representatives have intractable conflicts of interest such that the adequacy of representation of Rule 23(a)(4) fail." (R. 1624). These allegations raised factual issues that required a plenary hearing to resolve. *See In re Corrugated Container Antitrust Litig.*, 752 F.2d 137, 143 (5th Cir. 1985) (plenary hearing with testimonial exploration required where a factual dispute exists); *see also Manual for Complex Litigation, Third*, § 30.13, p. 216 (1995) (hearing may be necessary where "the factual basis for a class action is challenged") (citing *General Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982) (requiring "rigorous analysis" by trial court before requirements of Rule 23(a) are met)); *cf. East Texas Motor Freight System v. Rodriguez*, 431 U.S. 395, 406 (1977) (where no class has been certified, the decision whether the named plaintiffs should represent the class is appropriately made on the "full record").

B. The Hearing in This Case.

Despite these requirements, the trial court's approval of the class action in this case was perfunctory, A-159-67, 195, and in lieu of an evidentiary hearing Objectors were allowed only to submit written proffers and affidavits as if in a summary judgment proceeding. Such limitations violated the principles of *Goldberg* where this Court held that a prohibition on a welfare recipient's right to present evidence "orally" or to "confront and cross-examine adverse witnesses" were "omissions that are fatal to the constitutional adequacy of the procedures." 397 U.S. at 268; *see also Pence v. Kleppe*, 529 F.2d 135, 143 (9th Cir. 1976) (written testimony is inadequate to satisfy due process when hearing involves an important property

right); *Calhoun v. Cook*, 487 F.2d 680, 683 (5th Cir. 1973) (intervenors afforded right "to present sworn testimony" at settlement hearing). Moreover, the district court in this case resolved factual disputes and credibility issues against Objectors without giving them the opportunity to present live witnesses. In sweeping and conclusory fashion, the district court found "that evidence presented by Plaintiffs and Defendants is *more credible* than the evidence presented by Objectors and, with respect to *conflicting factual issues*, resolves them in favor of Plaintiffs and Defendants and against Objectors." A-40-41 (emphasis added).

How the district court could make this "credibility" determination from written affidavits was never explained. *See Pence v. Kleppe*, 529 F.2d at 143 ("written documents do not allow the trier of fact to assess the demeanor and attitude of the various witnesses and thereby test their credibility"); *Autera v. Robinson*, 419 F.2d 1997, 1202 (D.C. Cir. 1969). Even if such credibility determinations could be made, however, Objectors were unable to respond effectively to the factual representations made at the fairness hearing since Objectors' affidavits had to be prepared in advance of the hearing. *Cf. Pence*, 529 F.2d at 143.

The trial court's prohibition on the right to cross-examine witnesses is even more at odds with this Court's prior decisions. The trial court repeatedly stated that it was placing great reliance on the fairness expert. A-129, 130, 194-95. Yet, it denied Objectors the right to cross-examine the fairness expert even though Objectors believed that his opinions contained numerous factual errors. Although the trial court gave Objectors an opportunity to submit suggested questions for the court to pose to the fairness expert, most of which the court never

asked, such opportunity was no substitute for the right to cross-examine so important a witness.

In *Reilly v. Pinkus*, 338 U.S. 269 (1949), this Court upheld an injunction against enforcement of an order by the Postmaster General purporting to terminate the defendant's mail privileges because at the termination hearing the defendant had been denied the right to cross-examine the government's expert witnesses. In finding the procedures employed at the hearing constitutionally deficient, this Court stated: "[I]n this kind of case as in others, one . . . must be given a reasonable opportunity to cross-examine witnesses on the vital issue [of the case]." 338 U.S. at 276; *see also Goldberg*, 397 U.S. at 269 (1970); *Jenkins,* 395 U.S. at 428 (1969) ("We have frequently emphasized that the right to confront and cross-examine witnesses is a fundamental aspect of procedural due process."); *ICC v. Louisville and Nashville R.R. Co.*, 227 U.S. 88, 93 (1913) ("All parties . . . must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal."). There is also strong support among the lower courts for the Objectors' right to cross-examine witnesses at a derivative suit or class action settlement hearing. *See GM Engine Interchange Litig.*, 594 F.2d at 1123 and n.19; *Girsh v. Jepson*, 521 F.2d 153, 157 (3rd Cir. 1975); *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 833 (3rd Cir. 1973); *Wolf v. Nazareth Enterprises, Inc.*, 303 F.2d 152, 154-55 (2nd Cir. 1962); *Cohen v. Young*, 127 F.2d 721, 724 (6th Cir. 1942).

Had Objectors been given the opportunity to cross-examine the fairness expert, they might have been able to demonstrate that his opinions were flawed and either changed those opinions or discredited them. For example, Objectors wanted to cross-examine the conclusion in his

affidavit that "there is a very real risk that all of Plaintiffs' claims could be barred by limitations" (R. 3799), and his opinion that, in securing a commitment from Cortez in the settlement to reduce the debt on the Cortez pipeline, plaintiffs created a present benefit which, together with other less important factors, yielded $22.5 million in lower future tariffs. (R. 3808). On the statute of limitations issue, there was a factual dispute over whether, and to what extent, any discount in the value of the class claims was warranted. On the debt reduction issue, there was a factual dispute over whether debt reduction was already part of the business plan of the Cortez pipeline and therefore if that commitment had any value at all. There were also serious problems with the expert's proposed allocation of the settlement proceeds and the award of attorney fees. (R. 3805-10). Objectors were denied the right to cross-examine the fairness expert on all these issues. Given the great weight assigned by the district court to the fairness expert's opinions, this was a denial of the right to cross-examination on "vital issues" in the case. *Reilly*, 338 U.S. at 276.

The right to offer rebuttal evidence is also an important due process right. *ICC*, 227 U.S. at 93. The district court refused to allow Objectors to "file affidavits and/or proffers by persons who previously have filed similar papers with the Court." A-87-88. The Tenth Circuit held that this refusal was "no additional due process violation." A-15.

In fact, this was a denial of due process because it effectively denied Objectors any opportunity to rebut the statements made by proponents of the settlement at the settlement hearing and in their last set of affidavits. Objectors' economist, Dr. Tysseling, had previously filed affidavits on the fairness of the settlement; and Mr. Figa,

an attorney, had previously filed an affidavit on the adequacy of representation and fairness issues. (R. 2280, 2663 and 2312). Accordingly, both experts were disqualified as rebuttal witnesses. Because Objectors had no other experts, this ruling left Objectors with no witnesses to rebut the most critical issues in the case.

Finally the district court's refusal to allow even minimal discovery into the conduct of settlement negotiations or to allow examination of witnesses on that subject at the settlement hearing itself compromised all of Objectors' other rights. This Court has not directly addressed the right to discovery as an element of due process. However, several courts of appeals have concluded (although not on due process grounds) that discovery into the conduct of settlement negotiations is critical to a proper evaluation of the fairness of the settlement and the adequacy of representation under Rule 23. *See GM Engine Interchange Litig.*, 594 F.2d at 1123-26 and nn.19 and 20 ("We think . . . the trial court's refusal to permit discovery or examination of the negotiations constituted an abuse of discretion."); *see also Girsh*, 521 F.2d at 157; *Saylor v. Lindsey*, 456 F.2d 896, 904; *cf. Amchem*, 521 U.S. at 621 ("the court would face a bargain proffered for its approval *without benefit of adversarial investigation*.") (emphasis added).

In its findings of fact, the district court concluded that "Objectors have not submitted any evidence of collusion," A-41, and the Tenth Circuit agreed. A-19. Given the trial court's prohibition on investigation into the conduct of the settlement negotiations, these rulings constituted a "Catch 22" for Objectors because they denied Objectors' claims of collusion on grounds of insufficient evidence while at the same time denying Objectors the means for discovering such evidence. *See Doninger v. Pacific Northwest Bell*, 564

F.2d 1304, 1313 (9th Cir. 1977) ("[T]he necessary antecedent to the presentation of evidence is, in most cases, enough discovery to obtain the material, especially when the information is within the sole possession of the defendant."); *see also* G. Donald Puckett, *Peering Into A Black Box: Discovery and Adequate Attorney Representation in Class Action Settlements*, 77 Tex. L. Rev. 1271, 1300 (1999) ("A right without access to the facts necessary for asserting the right is no right at all."). Often the best and sometimes the only direct evidence of collusion is to be found in the conduct of the settlement negotiations themselves. Moreover, the district court's assertion that Objectors "had access to significant discovery in this matter and the Texas case," A-80, reaffirmed by the Tenth Circuit, A-11, misses the mark. The discovery to which the Objectors had access was discovery on the merits; what they sought and were denied was discovery into the conduct of the settlement negotiations.

This is not, of course, to say that an inquiry into settlement negotiations is automatically required every time a class action is settled. If the objections are frivolous, no evidentiary hearing is required. *See Mandujano v. Basic Vegetable Products*, 541 F.2d 832, 836 (9th Cir. 1976). But that is not this case.

C. The Objections Were Factually Specific and Substantial.

Objectors made serious allegations of conflicts of interest in the representation of the class supported by affidavits that should have required specific factual inquiry and resolution. Indeed, many of these allegations were grounded in the structure of the settlement itself. They include:

(1) An award to each of the class representatives that was more than 300% greater than the recovery by the absent class members. At least four courts of appeals have held that "[W]hen a settlement explicitly provides for preferential treatment for the named plaintiffs in a class action, a substantial burden falls upon the proponents of the settlement to demonstrate and document its fairness." *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983); *accord Staton v. Boeing Co.*, 313 F.3d 447, 484-85 (9th Cir. 2002); *Crawford v. Equifax Payment Services, Inc.*, 201 F.3d 877, 882 (7th Cir. 2000); *Plummer v. Chemical Bank*, 668 F.2d 654, 660 (2nd Cir. 1982). The Eleventh Circuit in *Holmes* characterized a preference for named plaintiffs in the settlement as "facial unfairness," 706 F.2d at 1148, and placed a substantial burden on proponents of the settlement to overcome the facial unfairness of such an allocation. *Id.* Yet the Tenth Circuit did not even address this "facial unfairness" issue in its opinion, even though it was raised in both the trial court and on appeal. (R. 1635-37) (App. Br. at 50-52). Moreover, Objectors were denied the opportunity to examine class counsel about the justification for such preferences and none was offered at the fairness hearing. A-125-206.

(2) The settlement was negotiated by counsel whose case had been denied class action status on two prior occasions. At least three courts of appeals have held that settlements negotiated at the pre-certification stage require heightened scrutiny because an attorney who has not been approved as class counsel necessarily negotiates from a position of weakness. *See General Motors Interchange*, 594 F.2d at 1125 (7th Cir. 1979); *accord GM Truck*, 55 F.3d at 805 (3rd Cir. 1995); *Malchman*, 706 F.2d at 434 (2nd Cir. 1983). This was especially true here because the case was not only at the pre-certification stage, it had been

denied class certification. Thus, unlike other pre-certification cases where counsel can still make a credible threat to seek class certification at a future date, here the negotiating posture of class counsel could not have been weaker. *Cf. Amchem*, 521 U.S. at 621 (1997) ("Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer. . . ."). The trial court found that "[t]he settlement was fairly and honestly negotiated at arms-length." A-30. However, this finding does not address the lack of bargaining leverage and could not, in any event, be effectively refuted without an opportunity to inquire into the conduct of the settlement negotiations. As indicated in their proffers, Objectors wanted to know what, if any, role the class representatives played in the settlement negotiations (R. 4222), whether class counsel defended or disparaged the value of the "no transportation" claim in the settlement negotiations (R. 4220, 4231), and whether counsel had sufficient information to properly analyze this claim since it had not been the subject of discovery in the Colorado case. (R. 4398).

(3) The settlement was a classic "reverse auction." (R. 4238). *See* John Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1370 (1995). The reverse auction arises where there are overlapping class actions pending in different jurisdictions with separate counsel in each case involving the same or similar allegations. In such circumstances the defendant can settle with the attorney who will accept the lowest bid. *Id.* at 1371-72. That is exactly what happened here. defendant Shell had tried, but failed to settle the Texas class action at an earlier mediation. (R. 4389). *Cf. Prezant v. De Angelis*, 636 A.2d 915, 924 (Del. 1993) ("Indeed, the evil of inadequate representation is illustrated here, where

objectors had already rejected a settlement offer in the Illinois action similar to the one negotiated by De Angelis' counsel."). Defendants settled with Colorado counsel and obtained a release of the "no transportation" claim for little or no value, even though that claim was not included in the Colorado action and was valued by Objectors' expert at potentially over $200 million. (R. 2287). Cases involving similar circumstances have been considered to contain indicia of inadequate representation. *See Epstein v. MCA, Inc.*, 126 F.3d 1235, 1250-51 (9th Cir. 1997), *opinion withdrawn on other grounds and substituted*, 179 F.3d 641 (9th Cir. 1999); *Prezant*, 636 A.2d at 922.

(4) Objectors alleged that class counsel, Leo Crowley, had an undisclosed 50 percent ownership interest in one of the named plaintiffs (El Dorado) and that this interest disqualified counsel from representing the class because it violated Colorado Rule of Professional Conduct 1.8(j) which provides: "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of the litigation the lawyer is conducting for the client. . . ." Moreover, Crowley's personal interest in a recovery by one of the named plaintiffs meant that Crowley was benefitting himself when he recommended that the named plaintiffs receive a 300% premium over other class members. The trial court acknowledged Crowley's interest, but found "that this has not undermined the zealousness of the representation here and does not constitute a disabling conflict of interest." A-28, n.5. The Tenth Circuit never specifically addressed this allegation. The issue here was not so much zealousness, but whether Mr. Crowley's personal interest in receiving approximately $650,000 in the settlement through a 50% interest in one of the named plaintiffs (R. 4221) influenced the decision to allocate a more than 300% premium to the named plaintiffs. (R.

4237-38). Objectors were denied the opportunity to interrogate Crowley about the negotiations which lead to this premium.

(5) Objectors alleged that plaintiffs' other counsel, John Cogswell, lobbied in favor of SB 141 in the Colorado legislature while this case was pending. (R. 4308, 4219). SB 141 was a special interest bill strongly backed by the major oil companies, including some of the defendants in this case, while vigorously opposed by royalty owners. If passed, it could have cut in half the royalties paid to royalty owners. (R. 4312). Although the bill died in the Colorado legislature following a public outcry, Objectors argued that Cogswell's support of the bill demonstrated his divided loyalties, lack of zealousness, and inadequacy as class counsel. (R. 4189, 4228). The trial court refused to permit inquiry into this claim and the Tenth Circuit ignored it in its opinion.

(6) Objectors alleged serious conflicts of interest among the three groups represented by plaintiffs' counsel. Plaintiffs' counsel admitted that conflicts existed among the three groups. (R. 2357). The Tenth Circuit justified this conflict by accepting the representation of the proponents of the settlement that each group was represented by a separate class representative. A-17. Such separate representation, however, was meaningless unless each representative of a group understood that it was his responsibility to represent solely the interests of his group during the settlement negotiations. *See Amchem*, 521 U.S. at 627; *In re Joint Eastern and Southern Dist. Asbestos Litig.*, 982 F.2d 721, 742-43 (2nd Cir. 1992). Since the Court refused to allow inquiry into the settlement negotiations, it was never determined whether or not the class representatives lived up to their responsibilities. What

evidence there is indicates that the class representatives ceded settlement authority over the class actions to the Coalition. (R. 1020, 3597). This transfer effectively prevented the discharge of the responsibility that each class representative had to his separate group.

These claims constituted serious and specific allegations of conflicts of interest requiring factual inquiry and resolution. The district court, however, permitted no discovery, no live witnesses, no cross-examination and no rebuttal. A district court may "impose reasonable restrictions on the number [or order] of witnesses and on the substance of their testimony," *Jenkins v. McKeithen,* 395 U.S. at 429, but "a person's right to present his case should not be left to the unfettered discretion of the [district court]." *Id.* Yet that is precisely what happened here. Unless the writ is granted, unfettered discretion is likely to remain the due process standard by which class action settlement hearings are conducted.

II. The Courts of Appeals Are Split on the Procedural Rights of Objectors at Class Action Settlement Hearings and on the Application of Heightened Scrutiny in Pre-Certification Settlements.

In *United States v. State of Oregon*, 913 F.2d 576, 582 (9th Cir. 1990), the Ninth Circuit acknowledged a split among the circuits on the type of hearing to be afforded objectors in the settlement of a class action. The court stated:

> [A]lthough some circuits have allowed cross-examination of witnesses at hearings on class action settlements, *see, e.g., Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 833 (3rd Cir. 1973) (shareholder suit); *Girsh v. Jepson*, 521 F.2d 153,

> 157 (3rd Cir. 1975) (*citing Greenfield*); other courts have rejected this requirement. "The growing rule is that the trial court may limit its proceeding to whatever is necessary to aid it in reaching an informed, just and reasoned decision." *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). *See also Plummer*, 668 F.2d at 659 (court not expected to "convert settlement agreement hearings into trials on the merits"); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2nd Cir. 1974) (court "must stop short of the detailed and thorough investigation" of a trial). We think the latter is the better rule.

Id. at 582.

Although the Ninth Circuit correctly identified this split among the circuits, it failed to note that the Seventh Circuit also afforded objectors the right to cross-examine witnesses at class action settlement hearings, *see GM Engine Interchange Litig.*, 594 F.2d at 1123 and n.19 (7th Cir. 1979), while the Tenth Circuit does not. *See Jones*, 741 F.2d at 325. Moreover, there are internal splits within several circuits. For example, the law in the Fifth Circuit is far less clear than the Ninth Circuit suggested. While *Cotton v. Hinton*, 559 F.2d at 1331 (5th Cir. 1977) does say that the trial court "may limit its proceedings to whatever is necessary" to reach an informed decision, that case appears inconsistent with the Fifth Circuit's earlier decision in *Calhoun v. Cook*, 487 F.2d at 683 (5th Cir. 1973) ("[M]inimum procedural due process requires adequate notice of a hearing at which an opportunity will be afforded the parties to present sworn testimony and to cross-examine witnesses who sponsor opposing views.") and with its later decision in *In re Corrugated Container Antitrust Litig.*, 752 F.2d at 143 (5th Cir. 1985) (contested issues of fact must be resolved in a "plenary" hearing). There is also a

lack of clarity in the position of the Second Circuit. *Compare Wolf v. Nazareth Enterprises, Inc.*, 303 F.2d at 154 (2nd Cir. 1962) (court would look with disfavor on any restriction on objectors' right to cross-examine witnesses) with *Plummer v. Chemical Bank*, 668 F.2d at 659 (2nd Cir. 1982) (court need only explore the facts sufficiently to make intelligent determinations concerning adequacy and fairness). Even the Sixth Circuit is inconsistent. *Compare Cohen v. Young*, 127 F.2d at 724 (6th Cir. 1942) (objector was entitled to cross-examine witnesses and introduce evidence) *with Tennessee Assoc. of HMO v. Grier*, 262 F.3d 559, 566-67 (6th Cir. 2001) (district court may limit hearing to whatever is necessary to make informed decision).

The Ninth Circuit saw these inconsistencies as reflecting an evolution toward a "better rule," but this so-called "better rule" is no rule at all. It is instead the "unfettered discretion" that this Court condemned in *Jenkins v. McKeithen*, 395 U.S. at 429. This Court should resolve this split among the circuits (and within the circuits) and provide guidance as to the type of hearing required in class action settlements in order to protect the due process rights of absent class members whose rights are increasingly threatened by pre-certification settlements, as shown by this Court's decisions in *Amchem* and *Ortiz*.

The standard for review of pre-certification settlements is also increasingly muddled among the circuits. At least three circuits have held that settlements negotiated at the pre-certification stage are subject to "heightened scrutiny." *See GM Engine Interchange Litig.*, 594 F.2d at 1125 (7th Cir. 1979); *GM Truck*, 55 F.3d at 805 (3rd Cir. 1995); *Malchman*, 706 F.2d at 434 (2nd Cir. 1983). This Court has also mentioned the need for "undiluted, even heightened, attention in the settlement context" when a

court is asked to certify a settlement class. *See Amchem*, 521 U.S. at 620. However, even though this case involved a pre-certification settlement, the Tenth Circuit made no mention of the need for "heightened scrutiny." Nor did the Tenth Circuit require heightened scrutiny based on the 300% premium for the named plaintiffs. To add to the confusion, the precise meaning of "heightened scrutiny" remains unclear.

This Court should grant the writ to make the application and meaning of "heightened scrutiny" uniform in pre-certification settlements.

III. The Tenth Circuit's Opinion in This Case Conflicts with This Court's Decision in *Amchem*.

Objectors argued in the district court and again on appeal that the district court abused its discretion in certifying the settlement classes because there were antagonistic conflicts of interest among the three separate groups (the RIOs, the ORRIs and the SSWIOs), all of which were represented by the same counsel. The plaintiffs acknowledged this conflict (R. 2357), but argued (and the district court found) that it was cured by allowing the court to allocate the settlement proceeds among the three groups. A-42. The Tenth Circuit accepted this argument and, relying in part on *Amchem*, also noted that each group had its own class representative. A-16-17.

The Tenth Circuit's decision is in fact inconsistent with *Amchem*. In *Amchem*, this Court quoted *In re Joint Eastern and Southern Dist. Asbestos Litig.*, 982 F.2d 721, 742-43 (2nd Cir. 1992), with approval for the proposition that "the adversity among groups requires that the members of each group cannot be bound to a settlement except by consents given by those who understand that *their role*

is to represent solely the members of their respective groups." 521 U.S. at 627 (emphasis added). This Court then stated in affirming the Court of Appeals: "[T]he Third Circuit found no assurance here – either in the terms of the settlement or in the structure of the negotiations – that the named plaintiffs operated under a proper understanding of their representational responsibilities." *Id.*

The same is true in this case. Rather than arguing vigorously to maximize the settlement for their respective groups, the class action representatives each signed an Agency Agreement in which they granted the Coalition "full authority to settle all claims, subject only to the class representatives' right to file objections or suggestions" with the Coalition. (R. 1020, 3597). Thus, whatever separate role the three class representatives might otherwise have played on behalf of their individual groups was nullified by reuniting their respective authority in a single group that could not serve as a separate advocate for any one group. Furthermore, Albert Rutter, the lone class representative for the ORRIs, when questioned at his deposition (by defense counsel) as to how he could satisfy his fiduciary duty to the class, replied: "I don't know." (R. 4348-53).

It is no answer to say that the problem was solved by allowing the district court to allocate the settlement proceeds among the three groups. The district court did not actually "determine" the allocation among the groups, as the Tenth Circuit stated. A-16.

This characterization was factually inaccurate because the initial allocation was in fact made by plaintiffs' counsel representing all three groups and consisted of an allocation that valued the claims of the ORRIs and the RIOs equally with the SSWIOs, notwithstanding Objectors' contention that the ORRIs' and RIOs' claims were far

more valuable than the SSWIOs'. (R. 1643-44). The allocation was then modified at the request of the fairness expert by reallocating $1.2 million of the settlement proceeds ($1.19 million after adjustments) from the named plaintiffs to the absent class members. As so modified, the settlement was approved by the district court. A-37, 51.

Nothing in this process avoided the original conflict among the three groups because neither counsel nor the fairness expert could represent all the groups simultaneously and also "represent solely the members of their respective groups," as required by *Amchem*. The two roles are inconsistent with one another. The initial conflict of counsel was therefore not cured; it was simply transferred to the fairness expert and then enshrined in the settlement.

The claim that the district court "determined" the allocation is also legally unsound and conflicts with this Court's decision in *Evans v. Jeff D.*, 475 U.S. 717, 726-27 (1986). The district court did not have the authority to make a settlement for the parties or to determine any of its terms; it could only approve or disapprove a settlement that the parties made and submitted to the court. *Id.*; *Jeff D. v. Andrus*, 899 F.2d 753, 758 (9th Cir. 1989). Accordingly, if there was a conflict among the various groups when counsel for the class made the initial allocation, that conflict remained even after the modification suggested by the fairness expert was adopted by the district court. Either way, the separate advocacy required by the court in *Amchem* was missing. This Court should grant the writ to resolve a conflict between this case and *Amchem* and to ensure that the separate advocacy requirement of *Amchem* is properly applied by the circuit courts.

IV. The Tenth Circuit's Opinion in this Case Conflicts with This Court's Decision in *Ortiz*.

In *Ortiz*, this Court criticized the structural integrity of a settlement in which the same attorneys who represented clients in individual cases also negotiated settlements of class actions and settlement of the individual claims was made contingent by counsel for defendants on the settlement of the class actions. 527 U.S. at 852. The same problem existed here. The same counsel who negotiated settlement of the class actions also represented 76 individual claimants in the original Coalition case and settlement of that case was made contingent by counsel for defendants on the settlement of the class actions. (R. 2085). The Tenth Circuit ignored this problem even though it was raised below. (R. 1663-64) (App. Br. at 37). The writ should be granted to uphold *Ortiz*.

V. The Tenth Circuit's Opinion Invites Abuse in Class Action Settlements by Sanctioning a Collusive Reverse Auction.

Objectors argued in the trial court and on appeal that this case involved a collusive "reverse auction" in which the defendants were able to exploit the existence of overlapping class actions with the same or similar allegations by settling with the attorneys who would accept the lowest settlement offer. (R. 1672) (App. Br. at 61). *See* Coffee, *supra*, at 1372; Puckett, *supra*, at 1297-98. That is what occurred here. Texas plaintiffs succeeded in obtaining class action certification of a nationwide class, while the Colorado plaintiffs failed twice. Defendant Shell tried, but failed to settle cheaply with the ORRIs and the RIOs at a mediation of the Texas case. Defendants then turned to the low bidder, Colorado counsel, and forged a nationwide class action settlement in which plaintiffs' counsel will

receive more than $18 million in attorneys' fees, the class representatives and named plaintiffs will receive a more than 300% premium, defendants will obtain complete releases, while the class members will receive mere pennies on the dollar for their claims. Objectors argued that this sequence of events was strong evidence of collusion. *See Prezant*, 636 A.2d at 924. ("When competition among different sets of plaintiffs' counsel exists, as it does here, there is the ever present danger that unscrupulous counsel may 'sell out' the class in order to receive a fee").

A similar sequence of events came before this Court in *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996). In that case, Justices Ginsberg and Stevens in their dissent discussed *Prezant* and its conclusion that an inadequate class representative "'taint[s]' the entire settlement process." *Id.* at 397-98. In *Matsushita*, as in this case, the settling defendants were able to dispose of a class action pending in another court by incorporating claims into their settlement that were not contained in the pleadings of the case they settled. That tactic succeeded in *Matsushita* notwithstanding serious doubts about the adequacy of the class representative in the Delaware action because the Delaware Supreme Court upheld the settlement and this Court was bound to give full faith and credit to the Delaware court's judgment. *Id.*

Unlike *Matsushita*, the reverse auction issue in this case comes to this Court on direct review from a lower federal court decision that has found adequate representation notwithstanding the very same type of collusive settlement that was present in *Matsushita* and *Prezant*. Moreover, the need for corrective action is even greater in this case because the Tenth Circuit's decision mistakenly legitimized the reverse auction by rejecting Objectors'

challenge on the grounds that "no settlement could ever occur in the circumstances of parallel or multiple class actions . . . without (the competing cases) being accused by another of participating in a collusive reverse auction." A-19, 41-42. This is both untrue and unresponsive to the concern for collusive settlements expressed in *Prezant* and *Matsushita*.

The assertion that no case involving parallel class actions could ever settle if Objectors' argument was adopted is false because such actions could be settled without collusion if: (a) counsel in the competing cases were invited to join the negotiations and a joint settlement were reached; (b) only the claims pending in the case before the settling court were approved for settlement and the court expressly reserved the claims in the other case for trial, *see* RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(b) (1982); or (c) the court concluded that the representation in the settling case was adequate after a full evidentiary hearing. None of these approaches was taken here.

There is, of course, a fourth possibility. If the district court had refused to certify the class or rejected the settlement, the case could have gone to trial or settled in Texas where a class action had been certified in two separate evidentiary hearings, each lasting four days. Indeed, Objectors had asked the district court to abstain in the Colorado action in favor of the Texas cases, but the district court refused, A-56, 58, notwithstanding that the district court was required under Rule 23(b)(3)(B) to consider the pendency of another class action before granting class action status in the Colorado case. *See Wolf Prado-Steiman v. Bush*, 221 F.3d 1266, 1282 (11th Cir. 2000) ("[T]he district court should be careful not to certify

subclasses overlapping with certified classes in other related . . . litigation. . . ."). *See also* Conte & Newberg, *Newberg on Class Actions* § 7.31, p. 94 (4th ed. 2002) ("rarely should the same class be certified on the same cause of action before more than one court . . . ").

This Court should grant the writ to prevent further abuse of the reverse auction device in class action settlements.

CONCLUSION

For the reasons stated, Petitioners pray that this Court issue a writ of certiorari in this case to the Tenth Circuit.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

RUTTER & WILBANKS CORP.; ELLIOTT A. RIGGS; WILLIAM R. THURSTON, Trustee; GORDON TANNER; WALTER K. ARBUCKLE TRUST; ERIC B. WELLS; KEVIN C. WELLS; CHARLES R. WIGGINS; KEN KAMON,

Plaintiffs-Appellees,

v.

SHELL OIL COMPANY; SHELL WESTERN E&P, INC.; MOBIL OIL CORPORATION; MOBIL PRODUCING TEXAS & NEW MEXICO, INC.; MOBIL EXPLORATION & PRODUCING, U.S., INC.; EXXON MOBIL, INC.; CORTEZ PIPELINE COMPANY, a partnership; SHELL CO_2 COMPANY, LTD., a Texas limited partnership; KINDER MORGAN CO_2 COMPANY, a Texas limited partnership,

Defendants-Appellees,

No. 02-1220

(Filed Dec. 24, 2002)

W.M. BRELSFORD; JUDITH WALKER FUNK; REED GILMORE and W. H. GILMORE, JR., in their representative capacities as co-executors of the Estate of W. H. Gilmore, Sr. and Dorothy R. Gilmore; PEGGY B. STUART; ANTELOPE ENERGY CO., LLC; ANTELOPE PRODUCTION CO.; WILLIAM G. KEMP and MARIE J. BENCH, in their representative capacities as co-trustees of the Bernard M. Bench Family Trust,

Objectors-Appellants.

MARGARET ANN AINSWORTH; CHARLES M. McAFEE & COMPANY; DOROTHY GAIL CHAPPELL; JOHN LARRY CLARK; NELDA LEE BARLOW; TROY M. OLIVER; SHORLENE OLIVER; POVERTY POINT PROPERTIES, L.P.; JOHN H. MILLER; DEE RENAY; HAZEL J. NEELY; INGRID JOANN HARTLEY; OLIVIA CARSON, LLC; INA F. GRAY; BARBARA E. GLAZNER; JOHN H. GLAZNER; CLARA CUNDIFF; ESTATE OF VELMA

No. 02-1221

LOUISE HENDERSON; LOUIS M. GRAY; KIP E. MAKEEVER; EDITH DELIGHT JAMES; LAURA H. KENNEDY; CHARLES R. WIGGINS; ELVA GORSUCH; KEN KAMON; JERRY CHAFFIN; DOROTHY CHAFFIN; JOHNNIE E. DURAN; VICTOR DURAN; LeROY OLIVER; J. ELLEN OLIVER; WANDA HEATHMAN; IDENE MINCHIN; ERIC B. WELLS; KEVIN C. WELLS; WOOD OIL COMPANY,

Plaintiffs-Appellees,

v.

SHELL OIL COMPANY; SHELL WESTERN E&P, INC.; MOBIL OIL CORPORATION; MOBILE PRODUCING TEXAS & NEW MEXICO, INC.; MOBIL EXPLORATION & PRODUCING U.S., INC.; EXXON MOBIL, INC.; CORTEZ PIPELINE COMPANY, a partnership; SHELL CO_2 COMPANY, LTD., a Texas limited partnership; KINDER MORGAN CO_2 COMPANY, a Texas limited partnership,

Defendants-Appellees,

BRUCE TEFFT; LUCINDA DAVIS; CHARLES BUTLER,
Objectors-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. NOS. 00-Z-1854 and 00-Z-1856)

Gary J. Cruciani, McKool Smith, P.C., Dallas, TX (Jean E. Dubofsky, Jean E. Dubofsky, P.C., Boulder, Colorado, and Dean Neuwirth, Burke & Neuwirth, P.C., with him on the briefs) for Objectors-Appellants.

Marie Roach Yeates, Vinson & Elkins, L.L.P., Houston, Texas ,Andrew McCollam III, Gwen J. Samora, Vinson & Elkins, L.L.P., Houston, Texas; Kent Sullivan, Stinson Morrison Hecker LLP, Kansas City, Missouri; Phillip D. Barber, Phillip D. Barber P.C., Denver, Colorado; Shannon H. Ratliff, Akin Gump Strauss Hauer & Feld, LLP, Austin, Texas; Robert E. Youle, Brian G. Eberle, Sherman & Howard, L.L.C., Denver, Colorado; John F. Shepherd, Holland & Hart L.L.P., Denver, Colorado, with her on the briefs) for Defendants-Appellees.

John M. Cogswell, Buena Vista, Colorado and Michael J. Heaphy, Denver, Colorado, submitted a brief on behalf of Plaintiffs-Appellees.

Before **TACHA, ANDERSON**, and **EBEL**, Circuit Judges

ANDERSON, Circuit Judge.

This appeal arises from the district court's approval of a $70 million class action settlement of four related cases involving the production of carbon dioxide (CO_2) contained within the McElmo Dome Unit in Colorado. Appellants are eleven objectors ("Objectors") who assert interests in several small royalty and overriding royalty interests in the McElmo Dome Unit, and who object to the settlement.[1]

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[1] Objectors are members of only two of the three class actions involved in this case and purport to appeal the settlement only as it relates to those two classes. Plaintiffs have filed a Motion to Partially Dismiss this appeal on the ground that Objectors are not class representatives, have made no effort to achieve that status, and therefore do not represent the class members in those two cases and can only object to the settlement as it affects their own individual interests. Plaintiffs seek dismissal of the appeals as to all class members other than Objectors because, inasmuch as the settlement agreement provides that there shall be no distributions as long as there are appeals pending, the pendency of Objectors' appeals prevents any distribution.

While we are sympathetic to Plaintiffs' plight, we can see no practical way to separate Objectors' individual interests from those of the other class members without upsetting the entire settlement fund. Moreover, in *Devlin v. Scardelletti*, 122 S.Ct. 2005 (2002), in which the Supreme Court held that nonnamed non-intervening class members objecting to the approval of a settlement may appeal that approval even though they were not permitted to intervene, the Court noted that such an objector "will only be allowed to appeal that aspect of the District Court's order that affects him." *Id.* at 2013, 2010. The Court described that "aspect," however, as "the District Court's decision to disregard his objections." *Id.* at 2010. Objectors' objections were directed at the entire

(Continued on following page)

For the reasons that follow, we affirm the district court's approval of the settlement.

BACKGROUND

The first of the four related actions was filed in October 1996 as a purported class action on behalf of a coalition ("Coalition") of more than seventy McElmo Dome interest owners against various Shell Oil Company and Mobil Oil Company entities and the Cortez Pipeline Company (collectively "Defendants"). *CO_2 Claims Coalition v. Shell Oil Co.,* No. 96-Z-2451 (D. Colo. filed Oct. 22, 1996). The Coalition's claims generally were for damages and for future relief caused by the wrongful pricing by Defendants of CO_2 that was transferred through the Cortez Pipeline to oilfields in West Texas where Defendants used it to enhance oil production from older oilfields. After class certification was denied on two separate occasions because the court determined that the alleged class members' interests were too divergent to warrant class certification, the Coalition case proceeded as an individual (non-class) action.

Subsequently, in September 2000, three class actions were filed representing the three subgroups of interest holders in the McElmo Dome Unit, royalty interest owners ("RIOs"), the overriding royalty interest owners ("ORIOs"), and the small share working interest owners ("SSWIOs"). The three class actions are *Ainsworth v. Shell Oil Co.,* No. 00-Z-1856 (D. Colo. filed Sept. 22, 2000) (on behalf of the

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settlement. We therefore deny Plaintiffs' motion to partially dismiss the appeals.

McElmo Dome RIOs); *Rutter & Wilbanks Corp. v. Shell Oil Co.*, No. 00-Z-1854 (D. Colo. filed Sept. 22, 2000) (on behalf of McElmo Dome ORIOs); and *Watson v. Shell Oil Co.*, No. 00-Z-1855 (D. Colo. filed Sept. 22, 2000) (on behalf of the SSWIOs). The proposed class representative for each action was alleged to be a holder of the specific type of interest involved in the action, and represented similarly situated unnamed class members. The claims asserted were largely identical to those claims asserted in the CO_2 *Claims Coalition* action.

Objectors' counsel, Gary Cruciani, is the lead counsel in two competing class actions against the Defendants filed on behalf of certain McElmo Dome ORIOs and RIOs in the probate court of Denton County, Texas: *Shores v. Mobil Oil Corp.*, No. GC-99-01184 (Denton County Prob. Ct. filed Dec. 22, 1999) (on behalf of ORIOs); *First State Bank of Denton v. Mobil Oil Corp.*, No. 8552-01 (Denton County Prob. Ct. filed March 2001) (on behalf of RIOs).

By the summer of 2001, the CO_2 *Claims* case was nearing trial, after extensive discovery and other pretrial proceedings. After sporadic mediation efforts, at the encouragement of the district court, in August 2001, the Colorado parties pursued mediation under the guidance of former Colorado Supreme Court Justice Howard Kirshbaum. After more than seven weeks of negotiation, the parties agreed to and signed a settlement of all four actions (The CO_2 *Claims Coalition* action and the three class actions) on September 24, 2001. They also filed a joint motion for preliminary approval of the settlement.

The basic terms of the settlement were as follows: defendants agreed to pay almost $52.9 million in cash, with 8% interest from August 21, 2001, until the final

payment, the actual sum to be adjusted up or down based upon the number of actual subscribers to the settlement; defendants agreed to pay future relief of various sorts, which future relief the district court determined had a present value of $22.5 million; and the actual allocation of the settlement funds was to be determined by the district court. As finally adjusted, the settlement fund was $50,430,308.00. The settlement essentially required a minimum of 90% participation. After opt-outs, the final subscription rate to the settlement was as follows: 99.7869% of the RIOs; 87.5882% of the ORIOs; and 99.9996% of the SSWIOs. In total, the subscription percentage was 96.0081%. Objectors have not opted out of the Colorado settlement.

Meanwhile, on August 30, 2001, two of the Objectors (two of the Texas class representatives) acting on behalf of a named plaintiff in each of the two competing Texas actions, filed motions to intervene in the Colorado proceedings in order to object to the upcoming settlement. After the Plaintiffs in the Colorado proceedings had filed various motions, including the motion for preliminary approval of the class action settlement on behalf of the three class actions (*Rutter, Ainsworth,* and *Watson*) and a motion to appoint a fairness expert to review the fairness of the overall settlement, including any allocation as determined by the court, the district court held a status conference on October 1, 2001. After hearing from the two Objectors' counsel at the October 1 status conference, the district court established a briefing schedule on Objectors' motion to intervene.

Accordingly, Objectors appeared and argued at an October 26 hearing on their motion to intervene, at the conclusion of which the district court denied the motions to

intervene, "primarily . . . on timeliness." App. Vol. XV, tab 134 at 5010. Then, a hearing on preliminary settlement approval took place on November 14. The court noted that although it was not permitting the Objectors to formally intervene, it would permit them to file *amicus* briefs. On December 6, the court signed the order conditionally certifying the class, preliminarily approving the settlement, and formally appointing James Lyons as the fairness expert. Mr. Lyons was specifically directed to address the following matters:

> (1) the fairness, reasonableness, and adequacy of the Settlement Agreement as to the class members; (2) the fairness of Plaintiffs' proposed allocation of the Settlement Fund; (3) the fairness of Plaintiffs' claims for payment of costs and attorneys' fees from the Settlement Fund; (4) the fairness of Plaintiffs' proposed bonus allocation to the class representatives; and (5) other matters in the contemplation of the Court.

Lyons Aff. at ¶ 1 n.1, App. Vol. XII, tab 35 at 4125.

On December 14, a hearing on preliminary allocation was held, at which Objectors' counsel, Mr. Cruciani, presented his objections to the proposed allocation, and the court ensured that Mr. Cruciani was able to express his concerns to the fairness expert, Mr. Lyons.

On January 25, 2002, Objectors filed a 57-page brief objecting to the settlement, including affidavits and exhibits. They also filed motions to intervene for the

limited purpose of objecting to the proposed class settlement.[2] They objected on numerous grounds, including the total amount of the settlement, its resolution of the "no transportation" claim,[3] the allocation of the settlement, alleged conflicts of interest by Plaintiffs' counsel, and

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[2] As indicated, *supra,* the Supreme Court has recently ruled that a class member who objects to a class settlement need not intervene in the district court in order to have standing to appeal the district court's approval of the settlement. *Devlin,* 122 S.Ct. at 2013. We note that one court has held that *Devlin* only applies to mandatory class settlements, where class members have no option to opt out. *See Ballard v. Advance America,* 79 S.W.3d 835, 837 (Ark. 2002); *see also In re: Gen. Am. Life Ins. Co. Sales Practice Litig., Lewis & Ellis, Inc. v. Gen. Am. Life Ins. Co.,* 302 F.3d 799, 800 (8th Cir. 2002) (noting *Ballard* and stating "we believe the limited reading of *Devlin* has considerable merit," but avoiding deciding the issue). Were we to similarly narrow *Devlin*'s application, this entire appeal could be dismissed because Objectors did have the right to opt out of the settlement.

However, as *Devlin* makes clear, the issue of whether a non-intervening unnamed class member may challenge the fairness of the settlement "does not implicate the jurisdiction of the courts under Article III of the constitution," nor does it "raise the sorts of concerns that are ordinarily addressed as a matter of prudential standing." *Devlin,* 122 S.Ct. at 2009. We therefore elect to leave the scope of *Devlin* to another day, and proceed to the merits of this case, particularly in view of the fact that the parties do not discuss that argument and because the result of our decision is the same (unfavorable to Objectors).

[3] In brief, the "no transportation" claim involved a dispute as to who should have borne the cost of transporting the CO_2 to its ultimate destination in West Texas. The Objectors assert that the claim, which they included among their claims in the Texas cases, is worth up to $200 million. The Colorado cases did not include such a claim, and it is released by the settlement agreement. The fairness expert, along with Plaintiffs and Defendants, argue that because of many uncertainties regarding the viability of such a claim, it would be worth, if anything, far less than $200 million. The "no transportation" claim, which is based on several different theories, has not thus far succeeded in the Texas cases.

alleged "collusion" in the settlement negotiations. In his Affidavit concerning the proposed class action settlement, Mr. Lyons stated that he "had various and extensive discussions with counsel for all parties, including counsel for Objectors." Lyons Aff. ¶ 1, App. Vol. XII, tab 35 at 4125.

In February 2002, Objectors moved to take expedited discovery and sought to depose everyone involved in the settlement, which was denied. They also requested a status conference to discuss whether they would be allowed to present live testimony at the final fairness hearing scheduled for April 8, 2002. There was apparently a status conference held on February 11, 2002, which was not transcribed, and in which Objectors again requested permission to present live testimony at the final fairness hearing. The court invited briefs on the issue. Objectors then filed a motion to present live testimony, which the district court denied, stating:

> The Court, having presided over this entire matter for almost six years, is familiar with the case, and all elements thereof. The objectors have been afforded procedural protections. They have received notice, despite initial inefficiencies, and have alerted the Court to their concerns over this settlement via voluminous written material, exhibits, and affidavits. They have participated in this case since their intervention motions were filed, and have had access to significant discovery in this matter and the Texas cases. Under these circumstances . . . objectors' motion for live testimony will be denied.

Order at 3, App. Vol. XI, tab 104 at 3772.

However, the court did state that Objectors "may file additional written proffers and/or affidavits not to exceed

five pages each, on or before April 3, 2002," and it stated that they "may file with the Court suggested questions to be posed to Mr. Lyons at the Fairness Hearing, which the Court may or may not ask, on or before April 4, 2002." *Id.* at 3772-3773. At Objectors' request, those deadlines were extended to April 5, 2002, with written submissions not to exceed ten pages, although Objectors were directed they "may not file affidavits and/or proffers by persons who previously have filed similar papers with the Court." Minute Order, App. Vol. XII, tab 108, 109. The court also denied Objectors' motions to intervene for the limited purpose of objecting to the proposed settlement.

On April 5, Objectors filed written proffers of the live testimony they had hoped to present, exhibits, written questions for Mr. Lyons, and a motion for leave to reply to the parties' responses to their objections. Additional materials Objectors proffered on the day of the hearing, April 8, were not considered by the court.

At the April 8 final fairness hearing, counsel for Plaintiffs, Defendants, and Objectors were present and were allowed to argue. Additionally, Mr. Lyons testified as to his opinion of the fairness and reasonableness of the settlement. The district court repeatedly reminded all present that it was familiar with the case and had carefully considered all arguments, specifically including Objectors' arguments. Indeed, the judge stated, "[i]n light of the fact that the parties are settling or are attempting to settle this case, I am benefitted by the objectors' position in bringing a certain adversarial element back into the proceedings. This has caused an examination of the issues raised." Transcript of Settlement Hr'g, App. Vol. XVI, tab 139 at 5227. The district court accordingly gave final approval of the settlement at the conclusion of the April 8

hearing, and, on May 6, 2002, entered final judgments granting class certification, giving final approval of the settlement, and dismissing Plaintiffs' claims with prejudice. It then entered findings of fact and conclusions of law which specifically addressed Objectors' arguments, ruling against them and concluding that the settlement was fair, reasonable, and adequate.

Objectors brought this appeal, arguing: (1) the district court denied them due process by refusing to permit them to present live testimony in the final fairness hearing and denying them the right to file rebuttal affidavits and to cross-examine the fairness expert; (2) Plaintiffs' counsel failed to adequately represent the class and had conflicts of interest which rendered the settlement unfair and unreasonable; (3) the settlement itself was not fair and reasonable; and (4) the district court erred in failing to find that the entire settlement agreement was a collusive "reverse auction."

DISCUSSION

"Due process issues, which call for legal conclusions, are subject to *de novo* review." *United States v. Clark,* 84 F.3d 378, 381 (10th Cir. 1996). By contrast, "[w]e review the court's approval of the settlement agreement for an abuse of discretion." *United States v. Hardage,* 982 F.2d 1491, 1495 (10th Cir. 1993); *see also Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1026 (9th Cir. 1998) (noting that the district court's "decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he is exposed to the litigants, and their strategies, positions, and proof"). Any factual findings we review under the clearly erroneous standard. Fed. R. Civ. P. 52(a).

"In reviewing a court's determination for abuse of discretion, we will not disturb the determination absent a distinct showing it was based on a clearly erroneous finding of fact or an erroneous conclusion of law or manifests a clear error of judgment." *Cartier v. Jackson,* 59 F.3d 1046, 1048 (10th Cir. 1995).

I. Due Process Claim

Objectors argue their due process rights were violated by the district court's refusal to let them present live testimony in support of their objections at the final fairness hearing. They further argue the district court compounded that error by not allowing Objectors to present rebuttal affidavits or cross-examine Mr. Lyons, the fairness expert.

"'The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.'" *Kowalczyk v. INS,* 245 F.3d 1143, 1147 (10th Cir. 2001) (quoting *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976)); *Jones v. Nuclear Pharm., Inc.,* 741 F.2d 322, 325 (10th Cir. 1984) ("The essence of procedural due process is that the parties be given notice and opportunity for a hearing."). As we held in *Jones,* "[a]n objecting shareholder is not entitled, as a matter of right, to an evidentiary hearing during a settlement hearing." *Jones,* 741 F.2d at 325. Objectors attempt to distinguish *Jones* by arguing that the objector in that case "had complete access to discovery." *Id.* Our review of the record in this case fully supports the district court's conclusion that Objectors in this case had adequate discovery and opportunity to be heard:

> [Objectors] have received notice, despite initial inefficiencies, and have alerted the Court to their concerns over this settlement via voluminous written materials, exhibits, and affidavits. They have participated in this case since their intervention motions were filed, and have had access to significant discovery in this matter and the Texas cases.

Order at 3, App. Vol. XI, tab 104 at 3772. "The universal rule of due process is fairness; the trial court afforded all parties to the settlement, including [objector], such fairness." *Jones,* 741 F.2d at 325.

Similarly, we perceive no additional due process violation because the district court, shortly before the final fairness hearing, refused to permit Objectors to file rebuttal affidavits by parties who had already filed affidavits, and by its refusal to permit cross-examination of the fairness expert.[4] "Although the right to be heard is an integral part of due process, an individual entitled to such process is not entitled to dictate to the court the precise manner in which he is to be heard." *Id.* Objectors were afforded adequate due process.

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[4] As Plaintiffs and Defendants point out, Objectors had ample time to file rebuttal affidavits. The refusal about which they complain involves the decision five days before the final fairness hearing to not permit Objectors to file affidavits from those who had previously filed "similar" affidavits.

II. Adequacy of Representation and Conflicts of Interest

Rule 23(a) demands that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanson,* 150 F.3d at 1020; *see also Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 626 n.20 (1997) ("The adequacy heading also factors in competency and conflicts of class counsel.").

Objectors argue the district court abused its discretion in certifying the settlement classes, because the class representatives, and Plaintiffs' counsel, failed to adequately represent the classes and/or suffered conflicts of interest. Objectors particularly focus on Plaintiffs' counsel, alleging "numerous conflicts of interest." Appellants' Op. Br. at 28. The district court carefully examined this argument, and concluded "the Court finds that Plaintiffs' Counsel has vigorously and competently represented all class members." Findings of Fact and Conclusions of Law at 5-6, App. Vol. XV, tab 131 at 4786-87. Indeed, as Plaintiffs point out, Objectors fail to demonstrate why, given the fact that the court, not the parties, determined the allocation of the settlement between the various subgroups, any alleged conflict between those subgroups would be magnified or exacerbated by the fact that Plaintiffs' counsel represented all the groups. Rather, that situation would motivate Plaintiffs' counsel to seek the largest overall award possible.

Further, as Defendants point out, each subgroup had its own class representative during settlement negotiations, and the fairness expert spent considerable time reviewing the details of the settlement and the allocation, including recommending some modifications, which the district court accepted. *See Amchem Prods., Inc.*, 521 U.S. 591, 627 (1997) (noting that a settlement needs "structural assurance of fair and adequate representation for the diverse groups and individuals affected"). Additionally, Objectors themselves and their counsel argued strenuously on behalf of the RIOs and ORIOs, the two subgroups involved in the Texas cases. *See Gottlieb v. Wiles*, 11 F.3d 1004, 1008 n.4 (10th Cir. 1993), *overruled in part on other grounds, Devlin v. Scardelletti*, 122 S. Ct. 2005 (2002) (noting that any claim of inadequacy of representation "was cured by the [objectors'] active participation in the Rule 23(e) settlement approval hearing and by the district court's explicit addressing of the [objectors'] objections in its order approving settlement."). Given the district court's familiarity with the case, we perceive no abuse of discretion in its conclusion that "the adequacy requirement of Rule 23(a)(1) is satisfied in every respect and that no disabling conflicts exist here." *Id.* at 6.

III. Approval of Settlement as Fair and Reasonable

We have noted four factors to be considered in assessing whether a proposed settlement is fair, reasonable and adequate:

(1) whether the proposed settlement was fairly and honestly negotiated;

(2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt;

(3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and

(4) the judgment of the parties that the settlement is fair and reasonable.

Gottlieb, 11 F.3d at 1014; *see also Jones,* 741 F.2d at 324.

Objectors make a variety of arguments as to why the settlement was unfair and unreasonable. They particularly argue that the allocation of the settlement fund among the various subgroups is unfair. They also repeatedly allege that the settlement was the product of collusion, although they point to little concrete evidence in support of this allegation.[5] The district court carefully went through each of the four factors listed in *Gottlieb* and *Jones* and considered all of Objectors' arguments. The court thoroughly considered Objector's allocation arguments, and their arguments concerning purported collusion, and solicited extensive input from the fairness

[5] For instance, they assert that, because Defendants defeated Plaintiffs' two prior motions for class certification in the *CO_2 Claims Coalition* case, but supported class certification in connection with the settlement of that case plus the three class actions, an inference of collusion between Plaintiffs and Defendants is warranted. However, as Defendants assert, it was not inconsistent to oppose class certification in the *CO_2 Claims Coalition* case, when all types of interests were involved with no differentiation between the different subgroups, but to support it when each subgroup was separated into its own class with its own class representative.

expert. We conclude that the district court did not abuse its discretion in determining that the settlement, from which an extremely small percentage of class members opted out, was fair, reasonable and adequate, for substantially the reasons stated in the district court's findings of fact and conclusions of law.

IV. Reverse Auction Argument

Finally, Objectors argue the district court erred in failing to find that the settlement agreement was a collusive "reverse auction" designed to undercut the competing Texas class actions. The district court found that there was no evidence of collusion, and nothing Objectors direct us to in the record convinces us that the district court's finding on that point was clearly erroneous. Moreover, Objectors have no response to the argument the settling parties make, and with which the district court agreed, that Objectors reverse auction argument "would lead to the conclusion that no settlement could ever occur in the circumstances of parallel or multiple class actions – none of the competing cases could settle without being accused by another of participating in a 'collusive reverse auction.'" Findings of Fact and Conclusions of Law at 20, App. Vol. XV, tab 131 at 4801. Absent some more concrete evidence of collusion than Objector's conclusory allegations and inferences, we decline to disturb the district court's conclusion that the settlement was not a collusive reverse auction.[6]

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[6] In a short footnote in their brief, Objectors also assert that the district court erred in awarding excessive attorney's fees and in failing

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CONCLUSION

We have carefully reviewed the lengthy record and briefs in this case, and have fully considered all of Objectors' arguments. For the foregoing reasons, we AFFIRM the district court's judgment.

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to follow the *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) factors. They fail to further develop this argument, and we therefor do not address it.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinshienk

Civil Action No. 96Z2451 (MJW)
CO_2 CLAIMS COALITION, LLC,
Plaintiff,

vs.

SHELL OIL COMPANY, et al.,
Defendants.

Civil Action No. 00Z1854 (MJW)
RUTTER AND WILBANKS CORP, et al.,
Plaintiffs,

vs.

SHELL OIL COMPANY, et al.,
Defendants.

Civil Action No. 00Z1855 (MJW)
THOMAS WATSON, et al.,
Plaintiffs,

vs.

SHELL OIL COMPANY, et al.,
Defendants.

Civil Action No. 00Z1856 (MJW)
MARGARET ANN AINSWORTH, et al.,
Plaintiffs,

vs.

SHELL OIL COMPANY, et al.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING CLASS CERTIFICATION AND SETTLEMENT APPROVAL

(Filed May 6, 2002)

On December 6, 2001, the Court (1) conditionally certified class actions for settlement purposes in Case No. 00-Z-1854 (hereinafter "Rutter"), Case No. 00-Z-1855 (hereinafter "Watson"), and Case No. 00-Z-1856 (hereinafter "Ainsworth) and (2) preliminarily approved the settlement of those actions pursuant to a Settlement Agreement dated September 24, 2001. Plaintiffs and Defendants have filed their Joint Motion for Final Approval of Class Action Settlement and Related Orders (the "Joint Motion") and seek to have such certification and settlement approval made final.

On April 8, 2002, after having received and reviewed extensive submissions by Plaintiffs, Defendants, objectors including objecting class members ("Objectors"),[1] and the

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[1] Objectors include Antelope Energy, LLC, Antelope Production Co., William G. Kemp and Marie J. Bench, in their representative capacities as Co-Trustees of the Bernard M. Bench Family Trust, W.M. Brelsford, Lucinda Davis, Judith Walker Funk, Reed Gilmore and W.H. Gilmore, Jr., in their representative capacities as Co-Executors of the Estate of W.H. Gilmore, Sr. and the Estate of Dorothy R. Gilmore, Peggy B. Stuart, Bruce Tefft, and Charles Butler. Other persons and entities – Gerald O. Bailey, Harry Ptasynski, Bridwell Oil Company, W.L. Gray & Co., Tidelands Energy Company LP, and First State Bank of Denton, in its representative capacity as independent Executor of the Estate of Maude Ragland – sought to intervene and objected to the proposed settlement. The majority of this group (excepting only Tidelands Energy) subsequently opted out of the settlement. The Court's rulings on the motions to intervene are of record. Although the

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Court-appointed Fairness Expert[2] the Court conducted a hearing with respect to the foregoing matters. Having carefully considered the materials and arguments submitted to the Court by Plaintiffs, Defendants, Objectors, and the Court appointed Fairness Expert, including the stipulation of Plaintiffs and Defendants to confirm the Settlement-related numbers and decimals approximated at the hearing and taking notice of the Court's files and records in these cases and the filings and the materials contained therein, the Court makes the findings of facts and conclusions of law set out below in support of the judgments entered herein.

CLASS CERTIFICATION

1. Each of the cases – Ainsworth, Rutter, and Watson – qualifies for class action treatment under Fed. R. Civ. P. 23. Each case satisfies the requirements of Rule 23(a) and each meets the requirements of Rule 23(b)(3).

Requirements of Rule 23(a)

2. Each of the three classes is so numerous that joinder of all members is impracticable. The membership in the Ainsworth, Rutter, and Watson classes is approximately 1,700, 500, and 200, respectively, with members

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opted out parties have no standing to object to the settlement, the Court has considered the substantive comments and submissions of this second group, and the objections of Tidelands Energy, in ruling on the Joint Motion.

[2] The Fairness Expert submitted affidavits dated November 13, 2001 and April 2, 2002 which define the scope of his work.

residing in more than 45 different states. The requirements of Fed. R. Civ. P. 23(a)(1) are satisfied.

3. With regard to each of the classes, the following substantial questions of law and fact, among others, are common to the class: whether there was a conspiracy to monopolize transportation; whether there was a conspiracy to fix the price of transportation; and whether there was a conspiracy to fix the price of CO_2. The pleadings and other matters of record in the Court files demonstrate the existence of common questions of law and fact in each of the three cases. Rule 23(a)(2) is met in each case.

4. In each of the cases, the claims of the class representatives are typical of the claims of the class members, and this is clearly reflected in the pleadings and other matters of record on file with the Court. With regard to each class, the claims of the class members arise from the same or similar series of events and transactions from which their respective class representatives' claims arise. And, in each class, the claims of class members and the claims of the class representatives are based on the same legal theories. The requirements of Rule 23(a)(3) are satisfied in these cases for each of the three classes.

5. The requirements of Fed. R. Civ. P. 23(a)(4) are satisfied with respect to each class, and, for each class, the representative parties have fairly and adequately protected the interests of their respective classes throughout the litigation. The Court has had substantial opportunity to observe the nature and quality of the representation and advocacy of counsel throughout, both in person in numerous hearings and conferences and as reflected in the parties' motions and other papers. The Court is satisfied that these actions have been vigorously and competently

prosecuted by the class representatives and their counsel and that there are no disqualifying antagonistic or conflicting interests between the class representatives and their counsel and the respective classes they represent. Objectors have alleged that counsel for the class representatives (hereinafter "Plaintiffs' Counsel") have disqualifying conflicts of interest. The Court has carefully considered these allegations and finds them to be without merit.

Requirements of Rule 23(b)(3)

6. With regard to each of the three cases, the questions of law and fact that are common to the class predominate over questions that affect only individual class members. The predominance inquiry does not consist merely of "counting" the common and individual questions to determine which grouping is more numerous. Instead, the focus is on whether common or individual questions will be the principal focus of the parties' efforts.

7. In each of the three class cases, there are important questions that are common across the class. While each case also has significant questions that are individual in nature such that trial of the Ainsworth, Rutter, and Watson lawsuits on a class-basis would present management difficulties, the claims are to be settled rather than contested to a jury at trial. Accordingly, the management difficulties associated with the individual questions no longer undercut or overshadow the importance of the common questions present in the three class cases. Considering the common questions their relationship to the various claims for relief, the focus of the parties' efforts, and the relative importance of the questions in the litigation, the

Court finds and concludes that the predominance requirement of Rule 23(b)(3) is satisfied in each of the three class cases.

8. Setting aside the management difficulties that would be associated with any trial, a class action is superior to other available methods for the fair and efficient adjudication of the controversies for each of the three cases. Many factors make it appropriate to concentrate the litigation in a single forum in this Court and to resolve the controversies in a collective manner, including, among other things, the complex nature of the litigation, the need for extensive expert analysis, and the fact that the subject of the dispute, the McElmo Dome Unit, is located in Colorado. In view of the settlement, the management difficulties associated with trial are not present here and the superiority requirement of Rule 23(b)(3) is satisfied in each class case.

OBJECTIONS TO CERTIFICATION

9. Objectors challenge the propriety of class certification in principally two respects: Objectors argue that the adequacy requirement of Rule 23(b)(4) is not met; Objectors argue against a finding of predominance under Rule 23(b)(3).

10. Objectors dispute adequacy, arguing that because Plaintiffs' Counsel represent small share working interest owners (SSWIO's) as well as royalty (RIO's) and overriding royalty interest owners (ORRIO's), Plaintiffs'

Counsel have disabling conflicts of interest.[3] The Court rejects this contention and finds that this representation has not adversely affected any class members or rendered the representation by Plaintiffs' Counsel inadequate. To the contrary, the Court finds that Plaintiffs' Counsel has vigorously and competently represented all class members. The Court does not find that Plaintiffs' Counsel has sought to advance the interests of some class members at the expense of others.

11. Objectors assert other arguments against a finding that the adequacy requirement of Rule 23(a)(4) is satisfied here. Objectors contend, in effect, that the settlement fund is too small, the allocation of the settlement fund is inappropriate, and the simultaneous settlement of the Coalition and the class cases is improper – and that all this results from disabling conflicts on the part of the class representatives and their counsel. The overall value of the settlement is discussed in detail below as is allocation. The Court rejects the suggestion that the allocation of the settlement fund has undermined the adequacy of representation here. Under the settlement agreement, allocation of the settlement is commended to the Court and is not prescribed by the settling parties. The Court has carefully considered all of the adequacy-related arguments made by Objectors and rejects each of them.[4] The Court finds and concludes that the adequacy requirement of Rule

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[3] *See* intervenors-Objectors' Objections to Proposed Class Action Settlement at 35-37, 38-39.

[4] *See* Intervenors-Objectors' Objections to Proposed Class Action Settlement at 33-46. Those matters are addressed in more detail below in connection with final approval.

23(a)(1) is satisfied in every respect and that no disabling conflicts exist here.[5]

12. In their argument regarding the predominance requirement of Rule 23(b)(3), Objectors contend that the Court's denial of certification in No. 96-Z-2451 (the "Coalition lawsuit") precludes a different ruling in the Ainworth, Rutter, and Watson cases. This objection is without merit. Rule 23 expressly recognizes that certification-related rulings are subject to review and revision at any time. *See* Fed. R. Civ. P. 23(c)(1). Furthermore, the composition of the class proposed in the Coalition lawsuit, consisting of holders of many varied types of interests (including governmental and taxing entities), differs from the composition of the separate classes proposed in Ainsworth, Rutter, and Watson, which affects the mix of common and individual questions. Finally, concerns about management difficulties that would be encountered in adjudicating the various claims at trial are no longer present here in light of the settlement. Objectors have not demonstrated that certification here is inappropriate.

SETTLEMENT APPROVAL

13. To be approved under Rule 23, a class action settlement must be "fair, reasonable and adequate." *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (10th Cir. 1984). The following factors have been recognized as

[5] The Court has carefully considered Objectors' contention that adequacy is lacking due to Mr. Crowley's interest in El Dorado Investments. The Court finds that this has not undermined the zealousness of the representation here and does not constitute a disabling conflict of interest.

determinative: (1) whether the proposed settlement was fairly and honestly negotiated; (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and (4) the judgment of the parties that the settlement is fair and reasonable. *Gottlieb v. Wiles,* 11 F.3d 1004, 1014 (10th Cir. 1993); *Jones,* 741 F.2d at 324. Each of these factors is clearly satisfied in each of the cases under consideration here. The settlement under review here is, in every respect, fair, reasonable, and adequate to all concerned.

The settlement was fairly and honestly negotiated

14. The settlement was fairly and honestly negotiated in arms-length negotiations involving the parties and their counsel and comes after years of hard-fought litigation. Discovery, motion practice, and other pretrial preparation had been undertaken, and the parties and counsel had extensive knowledge regarding the strength and weaknesses of their claims and defenses. The initial mediated settlement negotiations occurred over two days in January 2001, and, at the Court's urging, face-to-face negotiations were renewed before the scheduled trial date in the Coalition case. A second mediation occurred in August 2001 and extended for three days. The mediation sessions were conducted by Justice Howard Kirshbaum of the Judicial Arbiter Group. The basic terms of the settlement were agreed upon at the close of the second mediation session. Seven more weeks were required, with numerous day-long negotiation sessions, to finalize the definitive written agreement.

15. Objectors argue that the settlement is the product of collusion but there is no evidence of that. Objectors' arguments are addressed in detail below, but the Court finds that there are no prima facie indicia of collusion and that this objection is without merit. The Court finds and concludes that the settlement was fairly and honestly negotiated at arms-length and that this factor supports granting final approval of the proposed settlement.

Serious questions of law and fact exist, which place the ultimate outcome of the litigation in doubt

16. Serious questions of law and fact exist, and these place the ultimate outcome of the litigation in doubt. These questions affect, and are at the heart of, each of the claims for relief in each of the cases and include questions concerning liability (*e.g.*, whether duties exist and whether they were breached), defenses (*e.g.*, whether claims are time-barred by limitations and to what extent), and damages. The Court's experience with these cases (through hearings, motions, and otherwise), and the Court's files and records, reflect that the parties' controversies are complicated and involved and would be difficult for a jury to understand and resolve. There is a wide range of potential outcomes, as is reflected in, among other things, the competing reports of the parties' respective experts. Predicting the likely outcome before a jury is highly uncertain and unreliable. The court finds and concludes that this factor favors granting final approval to the settlement.

The value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation

17. The settlement offers immediate recovery of approximately $50.4 million in cash plus future relief. Against this, the Court must weigh the mere possibility that continued litigation would, some years later, yield a sustainable verdict of some greater amount. *Gottlieb,* 11 F.3d at 1015; *Wilkerson v. Martin Marietta Corp.,* 171 F.R.D. 273, 285 (D. Colo. 1989); *In re New Mexico Natural Gas Antitrust Litigation,* 607 F. Supp. 1491, 1505 (D. Colo. 1984). This factor – the certainty of a substantial and substantive recovery now versus the potential for something larger later – weighs in favor of approving the settlement.

18. The cash value of the immediate relief offered by the settlement occurs in the upper portion of the range of possible litigated outcomes described by Defendants' expert Platt. The Court-appointed fairness expert, Mr. Lyons, describes the settlement amount as at the upper end or beyond the range that could generally be expected. The Court finds and concludes that the prospect of the immediate recovery of this cash payment outweighs the mere possibility of some greater relief at a future date.

19. In addition to the immediate cash payment, the settlement also includes future relief of substantial value, including (a) an annual mechanism by which royalty and overriding royalty owners will receive detailed CO_2 sales contract information and a procedure for the exclusion from the valuation process of contracts struck at prices that diverge from those obtained in armslength arrangements, (b) a precisely-defined method of establishing the base tariff rate and periodic detailed disclosures concerning

the inputs to and calculation of the base tariff rate, (c) netback enhancements relating to transportation costs, and (d) a royalty floor value of 20 cents per Mcf. The Magistrate Judge, Michael J. Watanabe, carefully reviewed the future relief and entered findings and recommendations, which the Court has approved. These future relief aspects further support the Court's conclusion that the value of an immediate recovery outweighs the mere possibility of some greater relief at a future date.

20. Absent settlement, it is likely that, in each of the four cases, the trial would last at least a month, with the considerable expenditure of time and resources by the Court and the parties, followed by lengthy appeals, resulting in substantial delay before any relief is available to the settling parties.

21. Objectors argue that the amount of the settlement is too small, thus suggesting that this factor does not support granting final approval. The Court is not persuaded by and rejects those arguments. Having carefully considered the arguments of Objectors and the parties, and the matters of record, the Court finds and concludes that the value of immediate recovery represented by the settlement outweighs the mere possibility of relief in the future. This factor favors granting final approval to the settlement.

The parties' judgment of the settlement as fair and reasonable

22. The expressed judgment of the parties and their counsel is that the settlement is fair, reasonable, and adequate. The recommendation of a settlement by experienced counsel is entitled to great weight, and courts have

consistently refused to substitute their judgment for that of counsel and the parties. *Wilkerson v. Martin Marietta Corp.*, 171 F.R.D. 273, 288-89 (D.Colo. 1997) (*citing Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)). This is because a court, "should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation; a presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in armslength negotiations between experienced, capable counsel after meaningful discovery." MANUAL FOR COMPLEX LITIGATION (Third) § 30.44 at 240 (1995). The Court also notes that the incidence of objections and opt-outs, taken together, is very small.

23. The Court finds and concludes that the parties' determination that the settlement is fair and reasonable favors granting final approval to the settlement.

The notice provided to potential class members meets all the requirements of Rule 23 and due process

24. The Court finds that, in accordance with Rule 23(e), notice of the settlement was sent to class members as directed by the Court's orders dated December 6, 2001, December 20, 2001, February 11, 2002, and February 12, 2002. The notice provided, including both the mailed notices and the publication notice, reasonably and fairly apprised potential class members of their rights in the proposed settlement, including their right to object by specified dates is the best notice practicable, and satisfies the requirements of Rule 23 and applicable law.

Requests for exclusion, adjustments to the original settlement amount, and allocation plan

25. Written requests for exclusion (hereafter "opt-outs") were received from 27 individuals or entities. However, two of these opt-outs, those associated with Ruth M. Mangel and Questar Exploration and Production, were withdrawn prior to the hearing. The Court finds, accordingly, that 25 persons or entities have requested exclusion, as follows:

1. The Alicia Bowdle Trust (Gary Shores)
2. Bonnie Lynn Bowdle Whiteis
3. Bridwell Oil Company
4. Brooks Exploration Company
5. Celeste C. Grynberg
6. Jack J. Grynberg
7. Celeste C. Grynberg and Dean G. Smernoff, co-trustees for Miriam Zela Grynberg
8. Celeste C. Grynberg and Dean G. Smernoff, co-trustees for Rachel Susan Greenberg
9. Celesta C. Grynberg and Dean G. Smernoff, co-trustees for Stephen Mark Grynberg
10. First United Methodist Church of Denton, Texas
11. Gerald O. Bailey
12. Global Natural Resources Corp.
13. Harry Ptasynski
14. Josephine Orr Reddy

15. Occidental Permian, Inc. (TOC-Rocky Mountain, Inc.)
16. Opal M. Barthel
17. Ruby P. Gray
18. W. L. Gray & Co.
19. William C. Armor, Jr.
20. Gregory H. Moore
21. Eastwood Capital, Ltd.
22. UMC Petroleum Corporation
23. Ocean Energy, Inc.
24. Margaret Bridwell Bowdle Estate
25. Fay Barthel

Of these 25 persons and entities opting out, two did so pursuant to contractual provisions in the Settlement Agreement (Bridwell Oil Company and Harry Ptasynski); they seek and will be granted exclusion from the settlement. Of the 23 other persons and entities who opted out of the classes, 14 are involved as plaintiffs in other currently-pending cases involving the McElmo Dome Field. Of the 9 thereafter remaining, 5 are oil and/or gas companies.

26. As a result of the contractual opt-outs and the opt-outs from the classes at above, the Unit Benchmark Decimal, adjusted as provided in the Settlement Agreement, is .112624428 and the adjusted settlement fund amount is $50,430,308.00. Subscriptions to the settlement, after these opt-outs, are as follows for the indicated categories of interest holders: 99.7869% (royalty interests); 87.5882% (overriding royalty interests); 99.9996% (small

share working interests). The total subscription percentage is 96.0081%. The present value of the future relief, both over the full period and a five-year period was previously approved. Those amounts, proportionately reduced to the Unit Benchmark are $21,415,167 (full period) and $13,990,206 (five-year period).

27. By order dated December 6, 2001, the Court appointed Mr. James M. Lyons as fairness expert in these cases. Mr. Lyons has carefully studied the litigation, has reviewed the submissions of Plaintiffs, Defendants, and Objectors, and has otherwise informed himself as described in his affidavits as necessary to provide opinions and recommendations herein. The Court finds that Mr. Lyons is exceptionally competent and has presented the Court with detailed and valuable recommendations, which the Court approves and adopts as set forth below. The Court also finds that Mr. Lyons has concluded that settlement is fair, reasonable, and adequate in every respect; that the overall settlement package to the claimants as a group is fair, reasonable, and adequate; and that the allocation plan and the settlement as allocated are fair, reasonable, and adequate.

28. By Order dated December 14, 2001, the Court preliminarily approved allocation of the settlement fund as follows: 41.9622% to the Coalition case; 32.6510% to the named plaintiffs in the Ainsworth, Rutter, and Watson cases; and 25.3868% to the class representatives and class members in the Ainsworth, Rutter, and Watson cases. Upon further review, including consideration of all the materials submitted by Plaintiffs, Objectors, and the fairness expert, the Court determines that the preliminarily-approved allocation should be modified. Specifically, the court finds that the fairness expert's suggested revisions to

the allocation are fair and reasonable; that the classes' participation risk factor should be increased from 75% to 85% and the resulting increased allocation to the classes, $1,191,402, should be taken from the amount previously allocated to the named plaintiffs; and that the settlement fund should be allocated according to the allocation plan previously approved, as now modified. Giving effect to this, the following are the allocation percentages and the resulting amounts of the cash settlement: 42.0170% and $21,189,303 to the Coalition case; 31.6300% and $15,951,120 to the named plaintiffs in the Ainsworth, Rutter, and Watson cases and the three class representatives subject to paragraph 29 below; and 26.3530% and $13,289,885 to the members in the Ainsworth, Rutter, and Watson cases other than the class representatives. The Court further orders that all cash amounts so allocated and amounts hereafter approved for attorneys' fees shall, after payment of administrative expenses, proportionately share in interest earned on the Settlement Fund. The court approves the allocation of future relief as follows: 22.0534%, $4,722,763 (full period), and $3,085,310 (five-year period) to the Coalition case; 17.7038%, $3,791,302 (full period), and $2,476,800 (five-year period) to the named plaintiffs in the Ainsworth, Rutter, and Watson cases; and 60.2428%, $12,901,102 (full period), and $8,428,096 (five-year period) to the class members in the Ainsworth, Rutter, and Watson cases other than the class representatives. The Court also finds that the allocation plan modifications do not require additional or supplemental notice to the classes because, under the adopted modifications, the consideration to the classes is increased compared with that previously disclosed to the classes based on the preliminarily-approved allocation.

29. The Court agrees with the fairness expert's recommendation concerning the compensation fund proposal and finds that the Plaintiffs' Motion to Establish compensation Fund should be granted only to the extent it requests compensation to the class representatives in the total amount of $18,550 for their time spent in connection with this litigation. The Court does not approve of the classes bearing the costs of providing the class representatives with the same settlement share as the named plaintiffs. However, the Court agrees to permit modification of the allocation plan such that Plaintiffs' Counsel contributes, from the attorneys' fees awarded to Plaintiffs' Counsel, the amount of $64,713 to the net amount for distribution to the classes, and, upon such contribution and for distribution purposes only, the class representatives shall be treated as named plaintiffs. The allocation of the Settlement Fund set forth in paragraph 28 above assumes that such payment will be made.

30. The Settlement Agreement provides for reduction of the gross settlement fund to account for administrative costs, management fees, litigation costs, and attorneys' fees. The Court finds as follows concerning these items. Concerning the administrative fund, Plaintiffs have applied for constitution of this fund in the initial amount of $1,010,785. The Court finds this amount to be fair, reasonable, and necessary and approves constitution of the administrative fund in this amount. Concerning litigation costs and management fees by order dated February 8, 2002, the Court approved and adopted the findings and recommendations of the Magistrate Judge allowing $2,180,145.95 in litigation costs plus $629,025 in management fees. Concerning attorneys' fees, an award based upon 25 percent of the net recovery to the classes is

sought. Based upon the percentage of fund methodology, augmented by the twelve factors articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), the Court finds that the requested fee of 25% of the classes' net recovery is fair and reasonable. The Court credits the thoughtful analysis of the fairness expert, Mr. Lyons, who has opined that the requested attorneys' fees are fair and reasonable. The Court rejects Objectors' objections regarding attorneys' fees.

31. The final percentage allocations indicated above reflect implementation of the modifications adopted herein to the allocation plan preliminarily approved by order dated December 14, 2001. These modifications address several concerns raised by Objectors, including their comments and contentions relating to participation credits and the risk analysis. The court has benefited from the involvement of Objectors and their comments concerning allocation, among other subjects. The court has carefully considered all Objectors' objections to the allocation of the settlement fund and, except as otherwise indicated, has found those objections to be without merit.

32. Viewed from the perspective of the overall settlement package and overall fairness, the Court finds and concludes that the settlement is fair, reasonable, and adequate in every respect. Separately and independently of its findings and conclusions regarding allocation to individual claimants, the Court finds and concludes that the cash payment and future relief to the settling claimants as a group is fair, reasonable, and adequate and fully satisfies the requirements of Rule 23 and applicable law.

33. Additionally, the Court finds and concludes that the allocation plan, and the settlement as allocated to

individual claimants, are fair reasonable, and adequate in every respect. Separately and independently of its findings and conclusions regarding overall fairness and adequacy, the Court finds and concludes that the cash payment and future relief, as allocated to the claimants individually, is fair, reasonable, and adequate and fully satisfies the requirements of Rule 23 and applicable law.

OBJECTIONS TO SETTLEMENT

34. The Court has carefully reviewed and considered all the arguments presented by Objectors in connection with the settlement. The Court has carefully reviewed and considered all the materials submitted by Objectors, including Objectors' proffers and the timely-submitted materials filed by Objectors from August 2001 to the time of the hearing. Although interventions sought by a number of persons and entities have been denied, their submissions to the Court regarding the proposed settlement have also been carefully and fully considered. The Court also denied Objectors' request to take discovery of the parties' counsel and others regarding settlement negotiations, finding that Objectors did not demonstrate that such discovery was necessary or appropriate, but Objectors have had access to substantial documents and discovery in these cases and have obtained discovery independently through litigation pending in Texas in which counsel for Objectors is involved. Objectors, through counsel, have been heard and have participated in hearings and briefing throughout the approval process, have received copies of all filings herein, and received notice of all settings and hearings. The Court finds that the evidence presented by Plaintiffs and Defendants is more credible than the evidence presented by Objectors and, with respect to

conflicting factual issues, resolves them in favor of Plaintiffs and Defendants and against Objectors.

35. Objectors have asserted a variety of objections to the settlement. These may be grouped as follows: (a) the settlement is the product of collusion; (b) the overall value of the settlement is too low; (c) the notice given to class members was inadequate; and (d) the allocation of the settlement proceeds is improper. The court has carefully considered all of the objections and has carefully reviewed the materials submitted by Objectors and the arguments and proffers made in their behalf. The Court finds that the objections are without merit for the reasons further detailed below.

Objections that the settlement was the product of collusion

36. Objectors contend that the settlement was the product of collusion. These arguments have been made, in one form or another, by Objectors' counsel since the time the settlement was first announced in August 2001. However, Objectors have not submitted any evidence of collusion and their arguments are not persuasive. Objectors identify what they call "indicia" of collusion: that Defendants successfully opposed certification in the Coalition case only to support it here; that the settlement was reached shortly after the Colorado Supreme Court announced its decision in *Rogers v. Westerman Farm Co.;* and that settlement fund is to be allocated "disproportionately." These alleged "indicia," whether considered together or separately, do not demonstrate collusion.

37. The Court finds nothing out of the ordinary in Defendants' approach to a litigation-related attempt at

certification in the Coalition case as compared to a settlement-related request for certification in Ainsworth, Rutter, and Watson. The classes proposed in the two situations differ significantly as do the circumstances. This is no indication of collusion. The timing of the settlement does not demonstrate collusion either. Settlement negotiations in these cases had occurred over a long period at the repeated urging of this Court. The August 2001 mediation, which ultimately led to consummation of the settlement, was scheduled at what the Court views as a completely predictable time, on the eve of trial in the Coalition case. Nothing in the allocation of the settlement proceeds indicates collusion either. The settlement agreement does not dictate the allocation and distribution of settlement funds but, instead, commends those issues to the Court. Under the agreement, Defendants have no role in the allocation of settlement funds, and Defendants have not advocated any position in that regard before the Court.

38. Objectors contend that the settlement was the product of an improper "reverse auction," but, again, there is no evidence of collusion and the Court finds this contention to be without merit. Objectors' counsel are counsel in competing class litigation pending in Texas filed several years after the lead case was filed in this Court. Presumably, Objectors' counsel would recommend to their clients that a greater sum be required to settle that litigation than the amount involved here. Those circumstances, however, do not demonstrate that collusion or any other impropriety has taken place here. Objectors' argument is a structural one that would lead to the conclusion that no settlement could ever occur in the circumstances of parallel or multiple class actions – none of the competing cases

could settle without being accused by another of participating in a "collusive reverse auction."

39. The parties were assisted in their settlement efforts by the Honorable Howard Kirshbaum, for whom the Court has great respect. The Court knows Justice Kirshbaum to be a respected jurist and a capable mediator, and there is nothing to indicate that either he or any of the parties or their counsel was a party to collusive settlement negotiations.

40. The Court has carefully considered all the submissions and arguments made by Objectors concerning the suggestion of collusion, and the Court finds them to be without merit. The Court finds and concludes that the settlement was not the product of collusion.

Objections that the value of the settlement is too low

41. Objectors' complaints that the overall value of the settlement is too low and/or that the post-allocated or net value of the settlement is too low are principally premised on the so-called "no transportation" claim.[6] Objectors argue that this claim is worth $200 million and, therefore, that the amount being paid in settlement is too low. Objectors' arguments are not persuasive.

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[6] *I.e.*, the claim that owners of royalty and overriding royalty interests are due royalties at the value of CO_2 at its place of ultimate disposition or use in West Texas (as opposed to place of production at the McElmo Dome Unit in Colorado) without any deduction for costs associated with transporting the CO_2 from Colorado to West Texas.

42. That Objectors posit claims with an alleged maximum value of $200 million does not render inadequate a settlement at some lower amount. Settlements represent compromise, which rarely occur at either the theoretical maximum or the theoretical minimum. The settlement under consideration here falls within the range of possible litigated outcomes.

43. There appear to be two distinctive theories for the no-transportation claim: a brochure-based claim arising from a brochure circulated to royalty and overriding royalty owners at the time of unit formation; and an implied covenant claim based on the *Rogers* decision. The Court expresses no opinion as to the correctness or not of the no-transportation claim or any of its underlying theories. Rather, the Court notes that, with regard to this claim and theories, there are serious legal and factual questions that place the ultimate outcome in doubt and that make it impossible to predict with any precision the outcome at trial.

44. The Court additionally finds that a claim based on *Rogers* faces substantial legal and factual uncertainties, including how *Rogers* would properly be found to apply to the facts at issue here, whether the pertinent agreements would be found to address transportation (and, therefore, whether an implied covenant is applicable), whether CO_2 is marketable at the wellhead or at the McElmo Dome Unit, and whether affirmative defenses (such as limitations) would prevent or reduce any recovery. The Court expresses no opinion regarding the strengths or weaknesses of any particular claims or defenses in this regard, but the Court finds that, in view of legal and factual questions, the fact and magnitude of any

Rogers-based recovery is a matter of substantial uncertainty.[7]

45. The Court rejects Objectors' contentions that the settlement here is an impermissible "aggregate" or "tied" settlement. The settlement here bears no resemblance to the situation in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). The proposed settlement in *Ortiz* sought to aggregate two distinctive categories of claims and claimants: (1) future/exposure only claims (on which no injuries or damages had yet been incurred, regarding claimants that were unidentified, and for which no lawsuits had been filed); and (2) pending/existing injury claims (on which injuries and damages had been incurred, claimants identified, and lawsuits filed). The settlement in *Ortiz* sought to require resolution of the future claims held by one set of class members as part of the settlement of the pending claims of another set of class members. Here, the class representatives and class members hold the same type of claims, seek the same type of relief, and are presently identified and represented. The Court also finds unpersuasive other assertions by Objectors that approval here is contrary to the dictates of *Ortiz* and *Amchem etc.*[8] Structural assurances exist in this matter, including the absence of any agreed allocation, selection of the Court as

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[7] Any suggestion that Plaintiffs' Counsel were unaware of or inattentive to the no-transportation claim or that this claim was not included in the settlement negotiations is incorrect. Shortly after the Rogers decision was issued, it was raised with the Court. The record reflects that the no-transportation claims and the associated implications and damages scenarios of Rogers were recognized by Plaintiffs' Counsel and were a subject of the parties' negotiations.

[8] *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

the ultimate arbiter of the allocation, and involvement of the fairness expert, that were absent in *Ortiz* and *Amchem*.

46. The Court also finds Objectors' complaints regarding future relief to be without merit. Many of those complaints derive from or relate to Objectors' "no-transportation" analysis, which, for the reasons discussed above, the Court finds unpersuasive. The settlement does not adopt the consent decree methodology wholesale but it uses that methodology as a starting point for determination of the base tariff rate subject to modifications provided for in the settlement agreement. The settlement agreement also provides for netback enhancements and a royalty value floor and provides for debt reduction commitments, which have the effect of reducing the base tariff rate. Defendants also agree to forego future recovery of in-field post-production costs. The future relief was carefully considered by Magistrate Judge Watanable, who made findings and recommendations in that regard, which the Court has approved and adopted. The Court has considered all of Objectors' arguments regarding the future relief, but finds them to be without merit. The Court finds and concludes that the future relief provided under the settlement is fair, reasonable, and adequate to all members of each of the classes.

Objections that the notice provided to class members was not adequate

47. Objectors argue that the notice of class settlement was deficient. For example Objectors take issue with the adequacy of the notices' discussion of the Texas class action litigation and the *Rogers*-based "no transportation"

claim. The Court finds that the notices provided adequate notice of all matters, including the Texas litigation and *Rogers*. There are limits to the amount of detail that can be included in a notice, and, in the context of multiple competing class litigation, such as exists here, care must be taken to ensure that the notice is accurate and even-handed. The Court carefully considered, and as appropriate required modification of, the several notices utilized here. The Court finds that the notices fully and fairly apprised the classes of these matters including their right to object by specific dates.

48. Notice of class settlement "must fairly apprize the class members of the terms of the proposed settlement and of their options." *In re Integra Realty Resources, Inc.*, 262 F.3d 1089, 111 (10th Cir. 2001), *quoting Gottlieb v. Wiles,* 11 F.3d 1004, 1013 (10th Cir. 1993). The Court finds that the notice of class settlement provided in these cases, including the supplemental and second and [sic] supplemental notices sent to the class members, satisfies this test. The Court has carefully considered Objectors' arguments regarding notice and finds them to be without merit. The Court finds that the notices provided in these cases to be appropriate in every respect and to satisfy the requirements of Rule 23 and applicable law. The Court finds that some of the Objectors' objections such as the objection to attorneys' fees were untimely.

Objections regarding the allocation of settlement funds

49. Objectors assert a variety of complaints regarding allocation, each of which has been carefully reviewed and considered by the Court. The fairness expert, Mr.

James M. Lyons, has also carefully considered Objectors' arguments and has made alternative recommendations which the Court has accepted. The Court finds and concludes that the allocation plan, modified as described above, is fair, reasonable, and adequate is rationally based on legitimate considerations, and satisfies the requirements of Rule 23 and applicable law.

50. Objectors contest the validity of the risk factors employed in the allocation plan, but, except with respect to the modifications noted above, the Court is not persuaded by Objectors' arguments. The Court finds that the class members and the named plaintiffs are not identically-situated from a limitations perspective. The Court also finds the other risk factors approved on December 14, 2001, as modified, to be fair, reasonable, and adequate. The Court finds and concludes that the differences in allocation do not constitute the awarding of a premium to one group over another but, instead, reflect reasonable real differences in the circumstances of the various claimant groups. The Court credits the thorough and careful review of the allocation-related issues by Mr. Lyons.

51. The orders and judgments of this Court, including the findings and conclusions set forth above, provide the necessary and appropriate information and detail regarding the settlement for the entry of final judgments in these cases, including the amount of the settlement fund (prior to any deduction or allocation), the amounts to be deducted from such settlement fund for administrative costs and other matters, the allocation plan, and other matters relating to the allocation and distribution of the settlement proceeds. There are no matters remaining to be decided by this Court prior to the entry of final judgments, although certain matters of a ministerial nature remain

and the Court retains jurisdiction to deal with those. The Court finds and concludes that there is no just reason for delay in the entry of final judgments under Fed. R. Civ. P. 54(b).

DATED at Denver, Colorado this 6 day of May, 2002.

/s/ Zita L. Weinshienk
ZITA WEINSHIENK,
Senior Judge
United States
District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinshienk

Civil Action No. 96-Z-2451 (MJW)

CO_2 CLAIMS COALITION, LLC,

Plaintiff,

vs.

SHELL OIL COMPANY, el al.,

Defendants.

Civil Action No. 00-Z-1854 (MJW)

RUTTER & WILBANKS, CORP., et al.,

Plaintiffs,

vs.

SHELL OIL COMPANY, et al.,

Defendants.

Civil Action No. 00-Z-1855 (MJW)

THOMAS E. WATSON, et al,

Plaintiffs,

vs.

SHELL OIL COMPANY, et al.,

Defendants.

Civil Action No. 00-Z-1856 (MJW)

MARGARET ANN AINSWORTH, et al.,

Plaintiffs,

vs.

SHELL OIL COMPANY, et al.,

Defendants.

ORDER

(Filed May 6, 2002)

THIS MATTER comes before the Court on Plaintiffs' Motion for Certain Orders and the Court being advised in the premises desires to confirm its rulings on April 8, 2002 and its rulings on Plaintiffs' Motions filed April 29, 2002 by orders of the Court. Accordingly, it is

ORDERED that Plaintiffs' Motion to Approve Certain Numbers and Amended Plan of Administration and Distribution is granted. It is

FURTHER ORDERED that the Motion for Approval of Attorney Fees and Other Fees as modified by the numbers contained in Plaintiffs' Motion to Approve Certain Numbers and Amended Plan of Administration and Distribution is granted. It is

FURTHER ORDERED that Plaintiffs' Motion to Amend Allocation Order dated December 14, 2001 is granted provided the sum of $1,191,402 shall be transferred from the Named Plaintiffs to the Classes. It is

FURTHER ORDERED that the cash Settlement Fund after the transfer ordered immediately above and present value of future relief shall be allocated as follows:

CASH SETTLEMENT FUND

Group	Allocation Percentages	Allocated Amounts
Coalition Lawsuit	42.0170%	$ 21,189,303
Named Plaintiffs	31.6300%	15,951,120

Classes	26.3530%	13,289,885
	100.0000%	$50,430,308

PRESENT VALUE OF FUTURE RELIEF

Group	Allocation Percentages	Allocated Amount for Future Relief	Allocated Amount for 5-Year Future Relief
Coalition Lawsuit	22.0534%	$ 4,722,763	$ 3,085,310
Named Plaintiffs	17.7038%	3,791,302	2,476,800
Classes	60.2428%	12,901,102	8,428,096
	100.0000%	$21,415,167	$13,990,206

FURTHER ORDERED that the Settlement Administrator, prior to making distribution of any attorneys' fees, deduct therefrom the sum of $64,713 and credit that amount to the Net Settlement Fund otherwise allocated for distribution to the Classes. It is

FURTHER ORDERED that the Class Representatives be treated as Named Plaintiffs for distribution purposes subject to the immediately above order. It is

FURTHER ORDERED that Plaintiffs' Motion for Approval of Plan of Administration and Distribution is granted provided the Plan of Administration and Distribution attached thereto shall be the Amended Plan of Administration and Distribution attached to Plaintiffs' Motion to Approve Certain Numbers and Amended Plan of Administration and Distribution which Amended Plan of Administration and Distribution is approved. It is

FURTHER ORDERED that Plaintiffs' Motion to Establish Administration Fund is granted. It is

FURTHER ORDERED that the Plaintiffs' Motion to Establish Compensation Fund is granted as to reimbursement compensation in the amount of $18,550 payable to the Class Representatives but is denied in other respects. It is

FURTHER ORDERED that Plaintiffs' Motion for Appointment of Claims Arbitrator, Kenneth Barnhill, is granted. It is

FURTHER ORDERED that Plaintiffs' Motion to Establish CO_2 Committee is granted with leave to counsel to organize the CO_2 Committee when the six director have been identified. It is

FURTHER ORDERED that Plaintiffs' Submission of Affidavit Jams [sic] S. Wilson dated April 26, 2002 (Final Numbers) is accepted and the Settlement Administrator is ordered to make distribution of the net amounts allocated to the Coalition, to the Named Plaintiffs, and to the Classes provided for by the Amended Plan of Administration and Distribution according to Schedules E, F, and G attached to such Affidavit. It is

FURTHER ORDERED that Plaintiffs' Motion to Approve Notices for Mailing is granted and the Settlement Administrator is authorized to mail to the Coalition members, Named Plaintiffs and current payees of the Classes the Section 6.5 Notice attached to said Motion; and Plaintiffs' Counsel are authorized to complete all blanks relating to the mailing date, bar date, and $500 filing fee in the Notice to Former Owners attached to the Motion and the Settlement Administrator is authorized to

mail to the former owners included in the Classes the letter and Notice to Former Owners attached as *Exhibit 2* and *Exhibit 3* to the Amended Plan of Administration and Distribution. It is

FURTHER ORDERED that the Settlement Administrator shall not distribute any money to any person without further order of Court.

DATED at Denver, Colorado this 6 day of May, 2002

BY THE COURT:

/s/ Zita L. Weinshienk
Zita L. Weinshienk
Senior Judge United States
District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinshienk

Case No. 00-Z-1854

RUTTER & WILBANKS CORPORATION, ELLIOTT A, RIGGS, WILLIAM R. THURSTON, Trustee, GORDON TANNER, WALTER K. ARBUCKLE TRUST, ERIC B. WELLS, KEVIN C. WELLS, CHARLES R. WIGGINS, and KEN KAMON,

Plaintiffs,

v.

SHELL OIL COMPANY, SHELL WESTERN E&P, INC., MOBIL OIL CORPORATION, MOBIL EXPLORATION AND PRODUCING U.S., MOBIL PRODUCING, TEXAS AND NEW MEXICO, INC., EXXON MOBIL, INC., CORTEZ PIPELINE COMPANY, a partnership, SHELL CO2 COMPANY, LTD., a Texas limited partnership and KINDER MORGAN CO2 CO., L.P., a Texas limited partnership,

Defendants,

v.

BENCH TRUST,

Applicant Intervenor.

ORDER

(Filed Oct. 29, 2001)

This matter was before the Court on October 26, 2001, for oral argument on motions to intervene. The Court heard the arguments and statements of applicant intervenors and

counsel, and made oral conclusions of law, which are incorporated herein by reference as if fully set forth. Accordingly, it is

ORDERED that Bench Trust's Motion To Intervene For The Limited Purpose Of Objecting To Tentative Settlement, filed August 30, 2001, is denied. It is

FURTHER ORDERED that Bench Trust's Motion For Abstention, filed October 22, 2001, is denied as moot. It is

FURTHER ORDERED that Bench Trust's Motion To File 15-Page response To Joint Motion For Preliminary Approval Of Class Action Settlement, filed October 22, 2001, is denied as moot. It is

FURTHER ORDERED that Plaintiffs' Motion To Strike Bench Trust's Reply In Support Of Its Intervention Motion, filed October 24, 2001, is denied as moot.

DATED at Denver, Colorado, this 26 day of October, 2001.

BY THE COURT:

/s/ Zita L. Weinshienk
ZITA L. WEINSHIENK,
Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinshienk

Case No. 00-Z-1856

MARGARET ANN AINSWORTH, CHARLES M. McAFEE & COMPANY, DOROTHY GAIL CHAPPELL, LAURA H. KENNEDY, JOHN LARRY CLARK, NELDA LEE BARLOW, TROY M. OLIVER, SHORLENE OLIVER, POVERTY POINT PROPERTIES, L.P., JOHN H. MILLER, DEE RENAY, HAZEL J. NEELY, INGRID JOANN HARTLEY, OLIVIA CARSON, L.L.C., INA F. GRAY, BARBARA E. GLAZNER, JOHN H. GLAZNER, CLARA CUNDIFF, ESTATE OF VELMA LOUISE HENDERSON, LOUIS M. GRAY, KIP E. MAKEEVER, EDITH DELIGHT JAMES, ELVA GORSUCH, JERRY CHAFFIN, DOROTHY CHAFFIN, JOHNNIE E. DURAN, VICTOR DURAN, LEROY OLIVER, J. ELLEN OLIVER, WANDA HEATHMAN, IDENE MINCHIN, ERIC B. WELLS, KEVIN C. WELLS, CHARLES R. WIGGINS, WOOD OIL COMPANY and KEN KAMON,

Plaintiffs,

v.

SHELL OIL COMPANY, SHELL WESTERN E&P, INC., MOBIL OIL CORPORATION, MOBIL EXPLORATION AND PRODUCING U.S., MOBIL PRODUCING, TEXAS AND NEW MEXICO, INC., EXXON MOBIL, INC., CORTEZ PIPELINE COMPANY, a partnership, SHELL CO2 COMPANY, LTD., a Texas limited partnership and KINDER MORGAN CO2 CO., L.P., a Texas limited partnership,

Defendants,

v.

RAGLAND ESTATE,

Applicant Intervenor.

ORDER

(Filed Oct. 29, 2001)

This matter was before the Court on October 26, 2001, for oral argument on motions to intervene. The Court heard the arguments and statements of applicant intervenors and counsel, and made oral conclusions of law, which are incorporated herein by reference as if fully set forth. Accordingly, it is

ORDERED that Ragland Estate's Motion To Intervene For The Limited Purpose Of Objecting To Tentative Settlement, filed August 30, 2001, is denied. It is

FURTHER ORDERED that Motion For Abstention, filed October 22, 2001, is denied as moot. It is

FURTHER ORDERED that Motion To File 15-Page response To Joint Motion For Preliminary Approval Of Class Action Settlement, filed October 22, 2001, is denied as moot. It is

FURTHER ORDERED that Plaintiffs' Motion To Strike Reply In Support Of Its Intervention Motion, filed October 24, 2001, is denied as moot.

DATED at Denver, Colorado, this 26 day of October, 2001.

BY THE COURT:

/s/ Zita L. Weinshienk
ZITA L. WEINSHIENK,
Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinshienk

Civil Action No. 00-Z-1854

RUTTER & WILBANKS CORP., et al.,

Plaintiffs,

v.

SHELL OIL COMPANY, et al.,

Defendants.

ORDER

(Filed Dec. 6, 2001)

The matters before the Court are conditional class certification for settlement purposes, preliminary approval of the Settlement Agreement, approval of Class Notice, appointment of Class Counsel, appointment of Fairness Expert, appointment of Settlement Administrator, and scheduling of the Fairness Hearing. On November 14, 2001, the Court heard arguments and statements of counsel, and made oral conclusions of law with respect to conditional class certification, the Settlement Agreement, Class Counsel, and the Fairness Expert. Parties filed additional evidence in support of their motion to appoint Poorman-Douglas as the Settlement Administrator, on November 16, 2001, and a stipulated revised Class Notice on December 5, 2001. Accordingly, it is

ORDERED that the terms used in this Order have the same meaning as set forth in the Settlement Agreement, dated September 24, 2001. It is

FURTHER ORDERED that the following classes are conditionally certified for settlement purposes:

(1) Case No. 00-Z-1854: All current and former owners or holders of overriding royalty interests in the Unit (and the respective heirs, successors, and assigns of each) whose overriding royalty interests bear upon or have borne upon working interests now or formerly owned or held by Shell, Kinder Morgan, Mobil, or Included Small Share Working Interest Owners save and except for (a) any owners of overriding royalty interests who are CO_2 Claims plaintiffs, (b) the Rutter named plaintiffs, and (c) any Excluded Persons;

(2) Case No. 00-Z-1855: All current and former owners or holders of small share working interests in the Unit (and the respective heirs, successors, and assigns of each) save and except for (a) small share working interest owners who are CO_2 Claims Plaintiffs, (b) the Watson named Plaintiffs, and (c) any small share working interest owners who are Excluded Persons as defined in this Agreement;

(3) Case No. 00-Z-1856: All current and former owners or holders of royalty interests in the Unit (and the respective heirs, successors, and assigns of each) whose royalty interests bear upon of [sic] have borne upon working interests now or formerly owned or held by Shell, Kinder Morgan, Mobil, or Included Small Share Working Interest Owners save and except for (a) any owners of royalty interests who are CO_2 Claims plaintiffs, (b) the Ainsworth named plaintiffs, and (c) any Excluded Persons.

It is

FURTHER ORDERED that the proposed Settlement Agreement is within the range of preliminary approval as being fair, reasonable and adequate to class members, and is approved. It is

FURTHER ORDERED that the Second Amended Joint Submission Re: Class Notice, filed December 5, 2001, is approved as adequate, with minor modifications, and the clerk shall file stamp the final tendered Notice. The Court finds the Notice reasonably apprises potential class members of their rights pursuant to the Settlement Agreement, and constitutes adequate and reasonable notice to them in accordance with Fed. R. Civ. P 23(e). Within seven days of this Order, plaintiffs' counsel are directed to notify potential class members of the conditional class certification of the above-described classes, the proposed settlement, and their rights with respect thereto. Notice shall be mailed to all known potential class members. A summary of the notice shall also be provided by publication. Potential class members may exclude themselves according to the procedures as set forth in the Class Notice. It is

FURTHER ORDERED that plaintiffs' request for use of 11-point font in the Class Notice is granted. It is

FURTHER ORDERED that John M. Cogswell, Esquire, 415 East Main Street, PO Box 1420, Buena Vista, Colorado, 81211 (719-395-2500); David C. Hjelmfelt. Esquire, 1600 Stout Street, Suite 1905, Denver, Colorado 80202 (303-446-0028); Leo Crowley, Esquire, 510 North Humphreys, PO Box 1928, Flagstaff, Arizona, 86002 (520-779-3607); and Michael J. Heaphy, Esquire, 1600 Stout Street, Suite 1905, Denver, Colorado 80202 (303-446-0383) are appointed as Class Counsel. It is

FURTHER ORDERED that appointment of James Lyons, Esquire, of Rothgerber, Johnson & Lyons, L.L.P., 1200 Seventeenth Street, Suite 3000, Denver, Colorado 80202 (303-623-9000) as Fairness Expert is approved. Mr. Lyons shall advise the class representatives, class members and the Court on

(1) the fairness, reasonableness and adequacy of the Settlement Agreement as to the class members;

(2) the fairness of plaintiffs' proposed allocation of the Settlement Fund;

(3) the fairness of plaintiffs' claims for payment of costs and attorneys' fees from the Settlement Fund;

(4) the fairness of plaintiffs' proposed bonus allocation to the class representatives; and

(5) other matters in the contemplation of the Court.

It is

FURTHER ORDERED that plaintiffs appointment of Poorman-Douglas Corporation, PO Box 4540, Portland, Oregon, 97208 (888-780-4362) as Settlement Administrator is approved. It is

FURTHER ORDERED that pending the final settlement hearing, all discovery and any pretrial proceedings in above-described lawsuits are stayed absent further order of the Court. It is

FURTHER ORDERED that all parties to the Settlement Agreement, class members, their creditors, agents and attorneys, and others acting in concert with them, all assignees, representatives, or trustees of any party to the Settlement Agreement or class member shall have any

right, title, or interest, and are enjoined from the assertion of any claims, liens, garnishments, and the like against in the Settlement Agreement until the proceeds thereof are disbursed in accordance with the Settlement Agreement and order of the Court.

FURTHER ORDERED that a hearing on final approval of the settlement agreement, fairness review, and preliminary approval of attorneys fees is set for a full-day hearing on February 11, 2002, 9:00 a.m. in Courtroom C-400, United States Courthouse, 1929 Stout Street, Denver, Colorado.

DATED at Denver, Colorado, this 6 day of December, 2001.

BY THE COURT:

/s/ Zita L. Weinshienk
ZITA L. WEINSHIENK,
Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinshienk

Civil Action No. 00-Z-1856

MARGARET ANN AINSWORTH, et al.,

Plaintiffs,

v.

SHELL OIL COMPANY, et al.,

Defendants.

ORDER

(Filed Dec. 6, 2001)

The matters before the Court are conditional class certification for settlement purposes, preliminary approval of the Settlement Agreement, approval of Class Notice, appointment of Class Counsel, appointment of Fairness Expert, appointment of Settlement Administrator, and scheduling of the Fairness Hearing. On November 14, 2001, the Court heard arguments and statements of counsel, and made oral conclusions of law with respect to conditional class certification, the Settlement Agreement, Class Counsel, and the Fairness Expert. Parties filed additional evidence in support of their motion to appoint Poorman-Douglas as the Settlement Administrator, on November 16, 2001, and a stipulated revised Class Notice on December 5, 2001. Accordingly, it is

ORDERED that the terms used in this Order have the same meaning as set forth in the Settlement Agreement dated September 24, 2001. It is

FURTHER ORDERED that the following classes are conditionally certified for settlement purposes:

(1) Case No. 00-Z-1854: All current and former owners or holders of overriding royalty interests in the Unit (and the respective heirs, successors, and assigns of each) whose overriding royalty interests bear upon or have borne upon working interests now or formerly owned or held by Shell, Kinder Morgan, Mobil, or Included Small Share Working Interest Owners save and except for (a) any owners of overriding royalty interests who are CO_2 Claims plaintiffs, (b) the Rutter named plaintiffs, and (c) any Excluded Persons;

(2) Case No. 00-Z-1855: All current and former owners or holders of small share working interests in the Unit (and the respective heirs, successors, and assigns of each) save and except for (a) small share working interest owners who are CO_2 Claims Plaintiffs, (b) the Watson named Plaintiffs, and (c) any small share working interest owners who are Excluded Persons as defined in this Agreement;

(3) Case No. 00-Z-1856: All current and former owners or holders of royalty interests in the Unit (and the respective heirs, successors, and assigns of each) whose royalty interests bear upon of [sic] have borne upon working interests now or formerly owned or held by Shell, Kinder Morgan, Mobil, or included Small Share Working Interest Owners save and except for (a) any owners of royalty interests who are CO_2 Claims plaintiffs, (b) the Ainsworth named plaintiffs, and (c) any Excluded Persons.

It is

FURTHER ORDERED that the proposed Settlement Agreement is within the range of preliminary approval as being fair, reasonable and adequate to class members, and is approved. It is

FURTHER ORDERED that the Second Amended Joint Submission Re: Class Notice, filed December 5, 2001, is approved as adequate, with minor modifications, and the clerk shall file stamp the final tendered Notice. The Court finds the Notice reasonably apprises potential class members of their rights pursuant to the Settlement Agreement, and constitutes adequate and reasonable notice to them in accordance with Fed. R. Civ. P 23(e). Within seven days of this Order, plaintiffs' counsel are directed to notify potential class members of the conditional class certification of the above-described classes, the proposed settlement, and their rights with respect thereto. Notice shall be mailed to all known potential class members. A summary of the notice shall also be provided by publication. Potential class members may exclude themselves according to the procedures as set forth in the Class Notice. It is

FURTHER ORDERED that plaintiffs' request for use of 11-point font in the Class Notice is granted. It is

FURTHER ORDERED that John M. Cogswell, Esquire, 415 East Main Street, PO Box 1420, Buena Vista, Colorado, 81211 (719-395-2500); David C. Hjelmfelt, Esquire, 1600 Stout Street, Suite 1905, Denver, Colorado 80202 (303-446-0028); Leo Crowley, Esquire, 510 North Humphreys, PO Box 1928, Flagstaff, Arizona, 86002 (520-779-3607); and Michael J. Heaphy, Esquire, 1600 Stout Street, Suite 1905, Denver, Colorado 80202 (303-446-0383) are appointed as Class Counsel. It is

FURTHER ORDERED that appointment of James Lyons, Esquire, of Rothgerber, Johnson & Lyon, L.L.P., 1200 Seventeenth Street, Suite 3000, Denver, Colorado 80202 (303-623-9000) as Fairness Expert is approved. Mr. Lyons shall advise the class representatives, class members and the Court on

(1) the fairness, reasonableness and adequacy of the Settlement Agreement as to the class members;

(2) the fairness of plaintiffs' proposed allocation of the Settlement Fund;

(3) the fairness of plaintiffs' claims for payment of costs and attorneys' fees from the Settlement Fund;

(4) the fairness of plaintiffs' proposed bonus allocation to the class representatives; and

(5) other matters in the contemplation of the Court.

It is

FURTHER ORDERED that plaintiffs appointment of Poorman-Douglas Corporation, PO Box 4540, Portland, Oregon, 97208 (888-780-4362) as Settlement Administrator is approved. It is

FURTHER ORDERED that pending the final settlement hearing, all discovery and any pretrial proceedings in above-described lawsuits are stayed absent further order of the Court. It is

FURTHER ORDERED that all parties to the Settlement Agreement, class members, their creditors, agents and attorneys, and others acting in concert with them, all assignees, representatives, or trustees of any party to the Settlement Agreement or class member shall have any

right, title, or interest, and are enjoined from the assertion of any claims, liens, garnishments, and the like against in the Settlement Agreement until the proceeds thereof are disbursed in accordance with the Settlement Agreement and order of the Court.

FURTHER ORDERED that a hearing on final approval of the settlement agreement, fairness review, and preliminary approval of attorneys fees is set for a full-day hearing on February 11, 2002, 9:00 a.m. in Courtroom C-400, United States Courthouse, 1929 Stout Street, Denver, Colorado.

DATED at Denver. Colorado, this 6 day of December, 2001.

BY THE COURT:

/s/ Zita L. Weinshienk
ZITA L. WEINSHIENK,
Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinshienk

Civil Action No. 00-Z-1854

RUTTER & WILBANKS CORP., et al.,

Plaintiffs,

v.

SHELL OIL COMPANY, et al.,

Defendants.

ORDER

(Filed Feb. 11, 2002)

The matters before the Court are Plaintiffs' Motion For Approval Of Present Value Of Future Benefits, Plaintiff Coalition's Motion For Approval Of Litigation Costs, both filed January 2, 2002, Plaintiff's Motion For Approval Of Management Fees, filed January 23, 2002, eight motions to intervene, filed on January 25, 2002, Intervenors-Objectors' Request For Status Conference Regarding Fairness Hearing, filed February 1, 2002, and Objectors' Motion For Leave To Take Expedited Discovery, filed February 4, 2002. The motions to intervene were filed by the following: Antelope Production Co., Antelope Energy Co., L.L.C., Judith Walker Funk, W.M. Brelsford, Peggy B. Stuart, Reed Gilmore and W.H. Gilmore, Jr. as co-executors for W.H. Gilmore's estate, and as co-executors of Dorothy R. Gilmore's estate, and William G. Kemp and Marie J. Bench as co-trustees of the Bernard N. Bench Family Trust.

Plaintiffs' motions for approval of future benefits, litigation costs, and management fees were referred on December 14, 2002, to Magistrate Judge Michael J. Watanabe pursuant to D.C.COLO.LR 72.1. After briefing and oral argument by the parties, the Magistrate Judge filed his recommendation on the former two motions on January 15, 2002, and on the latter motion, January 24, 2002. The parties did not file objections, although class members have filed objections to the settlement agreement. The remainder of motions listed above were not referred.

In the Magistrate Judge's recommendation on Plaintiffs' Motion For Approval Of Present Value Of Future Benefits, and Plaintiff Coalition's Motion For Approval Of Litigation Costs, he makes findings of fact and conclusions of law, and recommends that both motions be granted, with management fees to be added upon further consideration. As to management fees, he recommends that plaintiff's motion be granted, and that his previous January 15, 2002, recommendation approving litigation costs be amended to include the management fees as presented. The Court has considered carefully the findings and recommendations of the Magistrate Judge, and hereby adopts and approves both recommendations.

As to the remaining motions filed by objector-intervenors, the Court will deny those motions. Accordingly, it is

ORDERED that Plaintiffs' Motion For Approval Of Present Value Of Future Benefits is granted. It is

FURTHER ORDERED that Plaintiff Coalition's Motion For Approval Of Litigation Costs is granted. It is

FURTHER ORDERED that Plaintiffs Motion For Approval Of Management Fees is granted. It is

FURTHER ORDERED that Antelope Production Co.'s Motion To Intervene is denied. It is

FURTHER ORDERED that Antelope Energy Co., L.L.C.'s Motion To Intervene is denied. It is

FURTHER ORDERED that Judith Walker Funk's Motion To Intervene is denied. It is

FURTHER ORDERED that W.M. Brelsford's Motion To Intervene is denied. It is

FURTHER ORDERED that Peggy B. Stuart's Motion To Intervene is denied. It is

FURTHER ORDERED that Reed Gilmore and W.H. Gilmore, Jr. In Their Representative Capacities As Co-Executors Of The Estate Of W.H. Gilmore, Sr.'s Motion To Intervene is denied. It is

FURTHER ORDERED that Reed Gilmore and W.H. Gilmore, Jr. In Their Representative Capacities As Co-Executors Of The Estate Of Dorothy R. Gilmore's Motion To Intervene is denied. It is

FURTHER ORDERED that William G. Kemp And Marie J. Bench In Their Representative Capacities As Co-Trustees Of The Bernard M. Bench Family Trust's Motion To Intervene is denied. It is

FURTHER ORDERED that the portion of the February 1, 2002, Minute Order addressing a briefing schedule for the motions to intervene listed above is vacated. It is

FURTHER ORDERED that Intervenors-Objectors' Request For Status Conference Regarding Fairness Hearing is denied, with leave to question the Fairness Expert, Mr. James M. Lyons, Esq., at the final settlement hearing, scheduled for April 8, 2002. It is

FURTHER ORDERED that Objectors' Motion For Leave To Take Expedited Discovery is denied, with leave to question the Fairness Expert, Mr. James M. Lyons, Esq., at the final settlement hearing.

DATED at Denver, Colorado, this 8 day of February, 2002.

BY THE COURT:

/s/ Zita L. Weinshienk
ZITA L. WEINSHIENK,
Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinshienk

Civil Action No. 00-Z-1856

MARGARET ANN AINSWORTH, et al.,

Plaintiffs,

v.

SHELL OIL COMPANY, et al.,

Defendants.

ORDER

(Filed Feb. 11, 2002)

The matters before the Court are Plaintiffs' Motion For Approval Of Present Value Of Future Benefits, Plaintiff Coalition's Motion For Approval Of Litigation Costs, both filed January 2, 2002, Plaintiff's Motion For Approval of Management Fees, filed January 23, 2002, Bruce Tefft's Motion To Intervene and Lucinda Davis' Motion To Intervene, both filed January 25, 2002, Intervenors-Objectors' Request For Status Conference Regarding Fairness Hearing, filed February 1, 2002, and Objectors' Motion For Leave To Take Expedited Discovery, filed February 4, 2002.

Plaintiffs' motions for approval of future benefits, litigation costs, and management fees were referred on December 14, 2001, to Magistrate Judge Michael J. Watanabe pursuant to D.C.COLO.LR 72.1. After briefing and oral argument by the parties, the Magistrate Judge filed his recommendation on the former two motions on

January 15, 2002, and on the later motion, January 24, 2002. The parties did not file objections, although class members have filed objections to the settlement agreement. The remainder of motions listed above were not referred.

In the Magistrate Judge's recommendation on Plaintiffs' Motion For Approval Of Present Value Of Future Benefits, and Plaintiff Coalition's Motion For Approval Of Litigation Costs, he makes findings of fact and conclusions of law, and recommends that both motions be granted, with management fees to be added upon further consideration. As to management fees, he recommends that plaintiff's motion be granted, and that his previous January 15, 2002, recommendation approving litigation costs be amended to include the management fees as presented. The Court has considered carefully the findings and recommendations of the Magistrate Judge, and hereby adopts and approves both recommendations.

As to the remaining motions filed by objector-intervenors, the Court will deny those motions. Accordingly, it is

ORDERED that Plaintiffs' Motion For Approval Of Present Value Of Future Benefits is granted. It is

FURTHER ORDERED that Plaintiff Coalition's Motion For Approval Of Litigation Costs is granted. It is

FURTHER ORDERED that Plaintiff's Motion For Approval Of Management Fees is granted. It is

FURTHER ORDERED that Bruce Tefft's Motion To Intervene is denied. It is

FURTHER ORDERED that Lucinda Davis' Motion To Intervene is denied. It is

FURTHER ORDERED that the portion of the February 1, 2002, Minute Order addressing a briefing schedule for the above-motions to intervene is vacated. It is

FURTHER ORDERED that Intervenors-Objectors' Request For Status Conference Regarding Fairness Hearing is denied, with leave to question the Fairness Expert, Mr. James M. Lyons, Esq., at the final settlement hearing, scheduled for April 8, 2002. It is

FURTHER ORDERED that Objectors' Motion For Leave To Take Expedited Discovery is denied, with leave to question the Fairness Expert, Mr. James M. Lyons, Esq., at the final settlement hearing.

DATED at Denver, Colorado, this 8 day of February, 2002.

BY THE COURT:

/s/ Zita L. Weinshienk
ZITA L. WEINSHIENK,
Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinsheink

Civil Action No. 00-Z-1854

RUTTER & WILBANKS CORP., et al.,

Plaintiffs,

v.

SHELL OIL COMPANY, et al.,

Defendants.

ORDER

(Filed Mar. 29, 2002)

The matters before the Court are Objectors' Motion To Show Cause Regarding Class Notice Problems, And Motion To Quash Notice, filed February 19, 2002, Objectors' Motion To Present Live Witnesses At The Fairness Hearing, filed February 25, 2002, and Objectors' Motion To File Reply In Support Of Motion To Present Live Witnesses At The Fairness Hearing, filed March 26, 2002. On February 11, 2002, the Court held a status conference with Fairness Expert James Lyons, Esq., at which objectors were present. With regard to the Fairness Hearing, scheduled for April 8, 2002, objectors requested that they be permitted to present live testimony. The Court requested briefs on the issue. In lieu of live testimony, the Court suggested that objectors could question Mr. Lyons briefly.

As to objectors' motion concerning class notice, allegedly plaintiffs' counsel knew about class members potentially not in receipt of notice, but did not inform the Court

until 48 days later. A second class notice mailing ensued. At this point in time, any problems with class notice have been remedied. Notice, which the Court found to be adequate and to fairly apprise class members of settlement, has been distributed to class members, despite initial inefficiencies in identifying class members. Therefore, the Court will deny objectors' motion to show cause and to quash the new class notice.

Objectors have filed numerous papers, and now move the Court for permission to present live witness testimony at the Fairness Hearing. Twelve objectors filed a 57 page objection to the proposed settlement on January 25, 2002. They contend that the settlement is unfair, asserting that the allocation is grossly disproportionate, that the release of the "no transportation" claim is the product of a "reverse auction" and collusion, and that there are conflicts of interest between plaintiffs' counsel and the classes themselves. Objectors filed 59 exhibits in support of their objections, which include various affidavits and declarations.

Objectors contend that due process entitles them to call live witnesses for testimony and cross-examination at the Fairness Hearing. They request a three-day evidentiary hearing to present evidence of unfairness and collusion, asking to call 16 witnesses. They argue that several of the issues raised are outside the area of expertise of the Fairness Expert, and therefore, the Court should not rely on him for his opinions on those issues. The Court reminds objectors that Mr. Lyons' role as the Fairness Expert in the case is to advise the Court, class representatives and members on the fairness of the settlement. Insofar as any issue relates to fairness, Mr. Lyons is authorized to render opinions. In order for the Court to approve the class action

settlement, it must be "fair, reasonable, and adequate." *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (10th Cir. 1984).

Objectors rely on *In re New Mexico Natural Gas Antitrust Litigation*, 607 F. Supp. 1491 (D. Colo. 1984), for the proposition that they should be allowed full participation at the hearing. That court granted final approval of the settlement after conducting a one-day hearing, where four objectors presented testimony. Objectors also assert that their inability to access discovery material is grounds for live testimony participation here.

Plaintiffs oppose objectors' request and, citing *Jones*, assert that due process does not entitle objectors to present live testimony in this case. The issue in *Jones* was "whether the trial court violated the constitutional process due an objecting shareholder by failure to hear live testimony at the settlement hearing." *Jones*, 741 F.2d at 323. The objector had notice of the settlement hearing, opportunity to be heard, access to discovery in the underlying suit, and filed a memorandum with the court outlining his objections to the settlement. The Tenth Circuit stated that since the objector "was afforded the full panoply of procedural due process, . . . [t]he failure to conduct an evidentiary hearing . . . is not a violation of due process." *Id.* at 325. Furthermore, "[a]n objecting shareholder is not entitled, as a matter of right, to an evidentiary hearing during a settlement hearing." *Id.*

Defendants distinguish *New Mexico Natural Gas* on the grounds that, there, no affidavits had been filed prior to the fairness hearing, whereas, here, the Court is in receipt of many affidavits filed by objectors, plaintiffs, and defendants. In fact, many of the persons objectors seek to

call at the Fairness Hearing have filed affidavits with the Court.

The Court, having presided over this entire matter for almost six years, is familiar with the case, and all elements thereof. The objectors have been afforded procedural protections. They have received notice, despite initial inefficiencies, and have alerted the Court to their concerns over this settlement via voluminous written material, exhibits, and affidavits. They have participated in this case since their intervention motions were filed, and have had access to significant discovery in this matter and the Texas cases. Under these circumstances, the holding of the Court of Appeals for the Tenth Circuit in *Jones*, and the benefit of the Fairness Expert's fairness evaluation, objectors' motion for live testimony will be denied. Accordingly, it is

ORDERED that Objectors' Motion To Show Cause Regarding Class Notice Problems, And Motion To Quash Notice is denied. It is

FURTHER ORDERED that Objectors' Motion To Present Live Witnesses At The Fairness Hearing is denied. It is

FURTHER ORDERED that objectors may file additional written proffers and/or affidavits, not to exceed five pages each, on or before April 3, 2002. It is

FURTHER ORDERED that objectors may file with the Court suggested questions to be posed to Mr. Lyons at the Fairness Hearing, which the Court may or may not ask, on or before April 4, 2002. It is

FURTHER ORDERED that Objectors' Motion To File Reply In Support Of Motion To Present Live Witnesses At The Fairness Hearing is granted.

DATED at Denver, Colorado, this 29 day of March 2002.

BY THE COURT:

/s/ Zita Weinshienk
ZITA L. WEINSHIENK,
Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinsheink

Civil Action No. 00-Z-1856

MARGARET ANN AINSWORTH, et al.,

Plaintiffs,

v.

SHELL OIL COMPANY, et al.,

Defendants.

ORDER

(Filed Mar. 29, 2002)

The matters before the Court are Objectors' Motion To Show Cause Regarding Class Notice Problems, And Motion To Quash Notice, filed February 19, 2002, Objectors' Motion To Present Live Witnesses At The Fairness Hearing, filed February 25, 2002, and Objectors' Motion To File Reply In Support Of Motion To Present Live Witnesses At The Fairness Hearing, filed March 26, 2002. On February 11, 2002, the Court held a status conference with Fairness Expert James Lyons, Esq., at which objectors were present. With regard to the Fairness Hearing, scheduled for April 8, 2002, objectors requested that they be permitted to present live testimony. The Court requested briefs on the issue. In lieu of live testimony, the Court suggested that objectors could question Mr. Lyons briefly.

As to objectors' motion concerning class notice, allegedly plaintiffs' counsel knew about class members potentially not in receipt of notice, but did not inform the Court

until 48 days later. A second class notice mailing ensued. At this point in time, any problems with class notice have been remedied. Notice, which the Court found to be adequate and to fairly apprise class members of settlement, has been distributed to class members, despite initial inefficiencies in identifying class members. Therefore, the Court will deny objectors' motion to show cause and to quash the new class notice.

Objectors have filed numerous papers, and now move the Court for permission to present live witness testimony at the Fairness Hearing. Twelve objectors filed a 57 page objection to the proposed settlement on January 25, 2002. They contend that the settlement is unfair, asserting that the allocation is grossly disproportionate, that the release of the "no transportation" claim is the product of a "reverse auction" and collusion, and that there are conflicts of interest between plaintiffs' counsel and the classes themselves. Objectors filed 59 exhibits in support of their objections, which include various affidavits and declarations.

Objectors contend that due process entitles them to call live witnesses for testimony and cross-examination at the Fairness Hearing. They request a three-day evidentiary hearing to present evidence of unfairness and collusion, asking to call 16 witnesses. They argue that several of the issues raised are outside the area of expertise of the Fairness Expert, and therefore, the Court should not rely on him for his opinions on those issues. The Court reminds objectors that Mr. Lyons' role as the Fairness Expert in the case is to advise the Court, class representatives and members on the fairness of the settlement. Insofar as any issue relates to fairness, Mr. Lyons is authorized to render opinions. In order for the Court to approve the class action

settlement, it must be "fair, reasonable, and adequate." *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (10th Cir. 1984).

Objectors rely on *In re New Mexico Natural Gas Antitrust Litigation*, 607 F. Supp. 1491 (D. Colo. 1984), for the proposition that they should be allowed full participation at the hearing. That court granted final approval of the settlement after conducting a one-day hearing, where four objectors presented testimony. Objectors also assert that their inability to access discovery material is grounds for live testimony participation here.

Plaintiffs oppose objectors' request and, citing *Jones*, assert that due process does not entitle objectors to present live testimony in this case. The issue in *Jones* was "whether the trial court violated the constitutional process due an objecting shareholder by failure to hear live testimony at the settlement hearing." *Jones*, 741 F.2d at 323. The objector had notice of the settlement hearing, opportunity to be heard, access to discovery in the underlying suit, and filed a memorandum with the court outlining his objections to the settlement. The Tenth Circuit stated that since the objector "was afforded the full panoply of procedural due process, . . . [t]he failure to conduct an evidentiary hearing . . . is not a violation of due process." *Id.* at 325. Furthermore, "[a]n objecting shareholder is not entitled, as a matter of right, to an evidentiary hearing during a settlement hearing." *Id.*

Defendants distinguish *New Mexico Natural Gas* on the grounds that, there, no affidavits had been filed prior to the fairness hearing, whereas, here, the Court is in receipt of many affidavits filed by objectors, plaintiffs, and defendants. In fact, many of the persons objectors seek to

call at the Fairness Hearing have filed affidavits with the Court.

The Court, having presided over this entire matter for almost six years, is familiar with the case, and all elements thereof. The objectors have been afforded procedural protections. They have received notice, despite initial inefficiencies, and have alerted the Court to their concerns over this settlement via voluminous written material, exhibits, and affidavits. They have participated in this case since their intervention motions were filed, and have had access to significant discovery in this matter and the Texas cases. Under these circumstances, the holding of the Court of Appeals for the Tenth Circuit in *Jones*, and the benefit of the Fairness Expert's fairness evaluation, objectors' motion for live testimony will be denied. Accordingly, it is

ORDERED that Objectors' Motion To Show Cause Regarding Class Notice Problems, And Motion To Quash Notice is denied. It is

FURTHER ORDERED that Objectors' Motion To Present Live Witnesses At The Fairness Hearing is denied. It is

FURTHER ORDERED that objectors may file additional written proffers and/or affidavits, not to exceed five pages each, on or before April 3, 2002. It is

FURTHER ORDERED that objectors may file with the Court suggested questions to be posed to Mr. Lyons at the Fairness Hearing, which the Court may or may not ask, on or before April 4, 2002. It is

FURTHER ORDERED that Objectors' Motion To File Reply In Support Of Motion To Present Live Witnesses At The Fairness Hearing is granted.

DATED at Denver, Colorado, this 29 day of March 2002.

BY THE COURT:

/s/ Zita Weinshienk
ZITA L. WEINSHIENK,
Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinsheink

Civil Action No. 00-Z-1854

RUTTER & WILBANKS CORP., et al.,

Plaintiffs,

v.

SHELL OIL COMPANY, et al.,

Defendants.

MINUTE ORDER

(Filed Apr. 3, 2002)

ORDER ENTERED BY JUDGE ZITA L. WEINSHIENK

Joan E. Boline, Judicial Assistant

Dated: April 3, 2002

It is ORDERED that Objectors' Motion For Extensions Of Time And Page Limit Regarding Affidavits/Offers Of Proof, filed April 2, 2002, is denied, except that objectors may file affidavits and/or proffers, not to exceed 10 pages, if necessary, up to 2:00 p.m. on Friday, April 5, 2002. It is

FURTHER ORDERED that objectors may not file affidavits and/or proffers by persons who previously have filed similar papers with the Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinsheink

Civil Action No. 00-Z-1856

MARGARET ANN AINSWORTH, et al.,

Plaintiffs,

v.

SHELL OIL COMPANY, et al.,

Defendants.

MINUTE ORDER

(Filed Apr. 3, 2002)

ORDER ENTERED BY JUDGE ZITA L. WEINSHIENK

Joan E. Boline, Judicial Assistant

Dated: April 3, 2002

It is ORDERED that Objectors' Motion For Extensions Of Time And Page Limit Regarding Affidavits/Offers Of Proof, filed April 2, 2002, is denied, except that objectors may file affidavits and/or proffers, not to exceed 10 pages, if necessary, up to 2:00 p.m. on Friday, April 5, 2002. It is

FURTHER ORDERED that objectors may not file affidavits and/or proffers by persons who previously have filed similar papers with the Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinshienk

Case No 00-Z-1854 (MJW)

RUTTER & WILBANKS CORP., et al.,

Plaintiffs,

vs.

SHELL OIL COMPANY, et al.,

Defendants.

FINAL JUDGMENT

(Filed May 06, 2002)

Pursuant to this Court's Order dated December 6, 2001, the Joint Motion for Final Approval of Class Action Settlement and Related Orders and other motions concerning approval of the settlement agreement dated September 24, 2001 ("Settlement Agreement") came to be heard on April 8, 2002, due and adequate notice having been given of such motions. The Court having considered all papers filed herein and in related Case Nos. 96-Z-2451, 00-Z-1855, and 00-Z-1856 and otherwise being fully informed in the premises, and pursuant to the findings of fact and conclusions of law made orally by the Court on April 8, 2002 and such additional findings of fact and conclusions of law made in writing thereafter.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Terms used in this judgment have the meaning set forth in paragraph 12 hereof. As used herein (a)

"Settling Parties" shall mean the Rutter Class Members, the Rutter Named Plaintiffs, and the Defendants and (b) "Settling Party" refers to one of the Settling Parties.

2. This Court has jurisdiction over the subject matter of this action and over all parties to this action, including all class members who are Settling Parties, for the purpose of approving the settlement set out in the Settlement Agreement and otherwise.

3. Pursuant to Fed. R. Civ. P. 23, this Court hereby finally approves the Settlement set forth in the Settlement Agreement and makes final the conditional certification of the class set forth in the Court's Order dated December 6, 2001, which class is hereby defined as the Rutter Class Members.

4. The Court hereby dismisses all claims and causes of action herein with prejudice. Costs shall be borne by the party, including any Settling Party, incurring the same except as otherwise provided in the Settlement Agreement.

5. The Court finds that the Settlement set forth in the Settlement Agreement is in all respects fair, reasonable, and adequate to each of the Settling Parties, including the Rutter Class Members – who are Settling Parties, and the Settling Parties are hereby directed to perform its terms.

6. Plaintiffs' Counsel, Rutter Named Plaintiffs, and each of the Rutter Class Members who are Settling Parties are deemed to have, and by operation of this judgment and in accordance with the terms of the Settlement Agreement have, fully, finally, and forever released, relinquished, and discharged all Released Claims against the Defendant

Releasees and further have made a covenant not to sue the Defendant Releasees with respect to the Released Claims. None of the Rutter Named Plaintiffs or the Rutter Class Members who are Settling Parties, either directly, representatively, or in any other capacity, shall hereafter commence or prosecute any action or proceeding in any court or tribunal against Defendant Releasees with respect to any of the Released Claims.

7. The notice given to putative class members of this Settlement and other matters set forth in the Settlement Agreement was the best notice practicable under the circumstances, including the individual notice to all putative class members who could be identified through reasonable effort and the publication notice. Said notice provided due and adequate notice of these proceedings and of the matters therein, including the proposed Settlement set forth in the Settlement Agreement, to all persons entitled to such notice, and said notice fully satisfied the requirements of Fed. R. Civ. P. 23 and the requirements of due process.

8. The passage of title and ownership of the Settlement Fund in accordance with the terms and provisions of the Settlement Agreement is approved.

9. Except as otherwise provided in the Settlement Agreement, each of the Settling Parties, their agents, employees and counsel shall not be liable for anything done or omitted to be done in connection with these proceedings, the entry of this judgment, or the administration of the payments to eligible claimants as provided in the Settlement Agreement and this judgment.

10. Without affecting the finality of this judgment in any way and subject to the arbitration provisions of the

Settlement Agreement, this Court hereby retains continuing jurisdiction over (a) implementation of this Settlement and any award or distribution of the Settlement Fund, including interest earned thereon, (b) allocation and disposition of amounts of and from the Settlement Fund, and (c) all Settling Parties for the purpose of enforcing and administering the Settlement Agreement and this final judgment.

11. There is no just reason for delay and, therefore, pursuant to Fed. R. Civ. P. 54(b), the Clerk of the Court is hereby ordered to enter this final judgment.

12. The definitions set out below are taken from the Settlement Agreement and are intended to have the same meaning as set out in the Settlement Agreement.

a. "Agreement" means the Settlement Agreement.

b. "Ainsworth" means Margaret Ann Ainsworth who is a plaintiff in the Ainsworth Lawsuit and the Class Representative for the Ainsworth Class Members.

c. "Ainsworth Class Members" shall mean and include, collectively and individually, Ainsworth and all current and former owners or holders of royalty interests in the Unit (and the respective heirs, successors, and assigns of each) whose royalty interests bear upon or have borne upon working interests now or formerly owned or held by Shell, Kinder Morgan, Mobil, or included Small Share Working Interest Owners save and except for (a) any owners of royalty interests who are CO_2 Claims Plaintiffs, (b) any owners of royalty interest who opt out of this Settlement in accordance with the terms of this Agreement, (c) the Ainsworth Named Plaintiffs, and (d) any Excluded Persons as defined in this Agreement.

d. "Ainsworth Lawsuit" shall mean the lawsuit styled *Margaret Ann Ainsworth, et al v. Shell Oil Company, Shell Western E&P Inc., Shell CO_2 Company, Ltd.*, et al, No. 00-Z-1856; in the United States District Court, District of Colorado.

e. "Ainsworth Named Plaintiffs" shall mean, collectively and individually, the following: Dixie Alexander; Lyle J. Aulston; Betty L. "Mickie" Baker; Nelda Lee Barlow; Louise Bemis; Mary Neoma Bertrand; Ingrid Black; Olivia Carson, LLC; Jerry Chaffin; Dorothy Chaffin; Dorothy Gail Chappell; John Larry Clark; Julia L. Crow; Clara Cundiff; Ladora Davis; Edwin O. Duran; Johnnie E. Duran; Victor Duran; H. Jean Elder; Arthurene Edna Ellsworth; Margaret Faruggia (now Lyon); Michael J. Faruggia; Sarah L. Foust; Barbara E. Glazner; John H. Glazner; Eva Gorsuch; Ina F. Gray; Louis M. Gray; Ingrid Joann Hartley; Wanda Heathman; Estate of Velma Louise Henderson; Louise L. Howard; Jaco Production Company; Edith Delight James; Georgia L. Johnson; Ken Kamon; Laura H. (aka "L") Kennedy; Margaret Kroeger; John O. Lancaster; Lois Lancaster; N. Elaine Lancaster; William A. Lancaster; Joseph H. Lanier; Robert D. Lanier; Roger F. Lanier Revocable Trust; Kip E. Makeever; Michele Ann Makeever (now Kruse); Lois M. Martin; Charles M. McAfee & Company; John H. Miller; Idene Minchin; Mary E. Murphy; Dee Renay Neely; Hazel S. Neely; Leroy Oliver; S. Ellen Oliver; Farmers Home Administration for the Account of Leroy Oliver; Troy M. Oliver; W. Shorlene Oliver; Jimmie R. Perry; Roy L. Plemons; Poverty Point Properties, LP; Kelly Snow; Joe D. Tipton, Jr.; Merrie Tipton; Scott R. Tipton, Non-Exempt Trust; Betty Wells; Charles R. Wiggins, Mark Wilson and

Timothy A. Wilson, and their respective successors or successors-in-interest, heirs, and assigns.

f. "Claims" shall mean and include any and all causes of action, choses in action, demands, debts, obligations, duties, liens, liabilities, and theories of liability of whatsoever kind and nature, whether based in contract or tort, whether arising in equity or under the common law, whether by statute or regulation, whether known or unknown, whether asserted in the past, present, or fixture, whether contingent, prospective, or matured, whether for damages relief, injunctive relief, declaratory relief, equitable relief, or any other type of relief, whether for actual damages, liquidated damages, punitive damages, exemplary damages, compensatory damages, incidental damages, consequential damages, pecuniary damages, costs, expenses, attorneys' fees, penalties, or fines. Without limiting the foregoing in any way, the term "Claims" includes, but is not limited to, any and all matters and theories that were asserted or that might have been asserted in the Settled Actions. Without limiting the foregoing in any way, the term "Claims" includes, but is not limited to, Claims that Plaintiffs, Plaintiffs' Counsel, the Crowley Plaintiff, and the Class Members, or any of them, do not know or suspect to exist in their favor at the time of the execution of this Agreement and that, if known, might have affected the Settlement, the releases set forth in this Agreement, or any other action including, but not limited to, the decision to participate in or object to the Settlement.

g. "Class Members" shall mean and include, collectively and individually, the Ainsworth Class Members, the Rutter Class Members, and the Watson Class Members.

h. "CO_2 Claims Plaintiffs" shall mean and include, collectively and individually, the following persons and entities: A.L.K.S.K. Family Limited Partnership; Alco Petroleum, Inc., Jerry L. Allen, President; James E. Anthony; Russel and Lolita Aulston; William Beard, Beard Oil Company; Dalton and Lasell Becker; Faye Bertrand; H. L. Bigler Irrevocable Trust, Ann Bullwinkle, Trustee; Nellie Bradfield; Billie Carrbello; Chandler Chaffin; Elsie Chaffin; Sidney R. Clarke, Marjorie Crowley; Roberta Davis; Jacqueline Dobbins; Karl E. Donovan; Bernice Duncan; William C. Duncan; Nancy Conrad Erwin; Martha Fans; R. C. Gerlach; Leon and Yvonne Gilliland; Louise Hicks; Leland A. Hodges; Glen and Lois Hudgeons; Edgar S. Hummel '81 Trust, c/o Cynthia Gotto, Vice President, Union Bank of California Trust Dept.; Peter K. Hummel 81 Trust, c/o Cynthia Gotto, Vice President, Union Bank of California Trust Dept.; Virginia M. Hummel '81 Trust, c/o Cynthia Gotto, Vice President, Union Bank of California Trust Dept.; Hazel Jacobs; Lanier Farms, Inc.; Robert Lanier; Roy and George Leavitt; O. P. Leonard, Jr.; Leonard Enterprises, Inc.; Virginia A. Leonard, Individually and as Trustee of the Virginia Leonard Marital Trust; Albert G. Mahaffey; Charles L. Mahaffey; Mahaffey Bros.; Mahaffey Enterprises, Inc.; Joe L. Mahaffey; (Mahaffey Bros.); Mary Ellen McComb; Godwin Oliver; Harry Ptrasynski; Stuart Porter; Florence Randles; Daisy M. Reed Trust (Daisy Ives Reed) Susan Peters Trustee; Jeanne Reed; Reed and Sons, Inc.; Reed Freedom, Inc.; Wagon Wheel Land and Cattle, Inc.; Bridwell Oil Company, Gary Shores, Trustee; John H. Skidmore; Tidelands Energy Co.; Peter Hummel; Dwight and Jackie Wallace; Bill D. Watson; Cecil W. Watson; U/W of Anna W. Gai, Mr. Terry Oliver, Vice President & Trust Officer, Wells Fargo Bank; U/W of Terenzio Gai; F/B/O

Silvia G. Painton, Mr. Terry Oliver, Vice President & Trust Officer, Wells Fargo Bank; U/W of Terenzio Gai; F/B/O Angela G. Odell Trust, Mr. Terry Oliver, Vice President & Trust Officer, Wells Fargo Bank; U/W of Terenzio Gai; F/B/O Margory F. Gai Trust; Mr. Terry Oliver, Vice President & Trust Officer, Wells Fargo Bank; U/W of Harry A. Macintosh Trust; Mr. Terry Oliver, Vice President & Trust Officer, Wells Fargo Bank; Berenice J. Bradshaw Marital Trust; Mr. Terry Oliver, Vice President & Trust Officer, Wells Fargo Bank; Franklin J. Bradshaw Family Trust; Mr. Terry Oliver, Vice President & Trust Officer, Wells Fargo Bank; Beranice J. Bradshaw Revocable Trust; Mr. Terry Oliver, Vice President & Trust Officer, Wells Fargo Rank [sic]; Arthur and Esther Wilson (Wilson Bros.); Elza Wilson; James and Veda Wilson (Wilson Bros.); Marie E. Wilson; Marie E. Wilson, Trustee; Paul Wilson Family Trust, Barbara Burke, Trustee; Eldon Zwicker; Dalton A. Becker; B. Bradshaw Revocable Trust, Pursuit Energy Corporation; Andrews Royalty, Inc.; B. J. Bradshaw Marital Trust; Magic M&R, L.L.C; ROEC, Inc.; Richard Altman & Company; F. J. Bradshaw; Chandler Chaffin (Walter Ertel); Elsie F. Chaffin; Nancy Conrad; Roberta L. Davis; Karl Donovan; Nellie Donovan; Berniece E. Duncan Trust (and its trustees); William C. Duncan Trust (and its trustees); Hazel L. Jacobs Englehart; Martha Paris (Edwin Wilson); Anna Gai; Terenzio Gai; Lois Gerlach; Etha Gilliland Estate (Patterson); Lillie Hartle; Lester Hartle; Lloyd E. Hartle; Elizabeth V. Harclerode; Donnis DuCray; Virginia M. Hickey Trust; Roy R. Leavitt, June C. Leavitt; Sheryl A. Ives White; Sheryl Ives; Obie Leonard, Jr.; PANAN Energy, Inc.; R.W. Leonard Estate; VML Resources, Inc.; Harry Macintosh; John J. Wafer; Chad A. Macintosh; Richard A. Macintosh; Charlene R. Auvil; Daniel D. Dove; Mary L. Adkisson;

Patrick A. Macintosh; James B. Macintosh; Mahaffey Enterprises; C. L. Mahaffey; Daisy Mahaffey; Mary Ellen McComb (E. Wilson); Godwin Oliver (Ives Farms); Susan Peters; Ralph Peters; Stuart Mac Porter; Sharon Porter; Florence Randles (E. Wilson); Daisy Mae Reed Trust; Jack O. and Jeanne Reed, Trustees; Reed Freedom, Inc.; Wagon Wheel Land & Cattle Company, Inc.; Tidelands Energy; Jackie Elaine Wallace; Dwight Wallace; Billy D. Watson; Marie E. Wilson; S. Glen Wilson Trust, Marie F. Wilson, Trustee; Esther E. Wilson; Arthur A. and Esther Wilson; Elza Wilson (Edwin Wilson); James E. Wilson; PCW Ltd. Partnership.

i. "CO_2 Claims Lawsuit" shall mean the lawsuit styled *CO_2 Claims Coalition, L.L.C. v. Shell Oil Company, Shell Western E&P Inc, Mobil Producing Texas & New Mexico, Inc. and Cortez Pipeline Company*; CA. No. 96-Z-2451; In the United States District Court, District of Colorado.

j. "Cortez" shall mean Cortez Pipeline Company.

k. "Cortez Releases" shall mean, collectively and individually, Cortez, its current and former owners and/or partners (general or limited), their respective current and former parent companies, their respective current and former sister companies, their respective current and former affiliated companies, their respective current and former subsidiary companies, and their respective predecessors, successors, successors in interest, assigns, operating divisions, officers, owners, directors, employees, managers, attorneys, agents, general partners, limited partners, shareholders, investors, joint venturers, and insurers.

l. "Crowley Lawsuit" shall mean the lawsuit styled *United States of America, ex rel. Leo Crowley v. Shell Oil Company, Shell Western E&P Inc. Shell CO_2 Company, Ltd., et al.*, No. 00-Z-1220; In the United States District Court for the District of Colorado.

m. "Crowley Plaintiff" shall mean Leo Crowley, the relator in the Crowley Lawsuit, and shall not mean or include the United States of America.

n. "Defendants" shall mean, collectively and individually, Shell, Kinder Morgan, Mobil and Cortez.

o. "Defendant Releasees" shall mean, collectively and individually, the Shell Releasees, the Kinder Morgan Releasees, the Mobile Releasees, and the Cortez Releasees.

p. "Excluded Persons" shall mean and include, collectively and individually, the following individuals and entities, and theft [sic] respective affiliated and related Companies; Arco Oil and Gas Company, BP Amoco, Chevron U.S.A., Inc., Kinder Morgan CO_2 Company, Mobil Producing Texas & New Mexico, Inc., Occidental Permian Limited Partnership, Phillips Oil Company, Texaco Exploration & Production, Inc., the State of Colorado, the United States of America, Montezuma County, Dolores County, Colorado municipalities and/or taxing entities, and the heirs, successors or assigns of all of the foregoing with respect to any interests transferred on or after August 8, 2001. In addition to the foregoing, the term "Excluded Persons" shall also mean and include, collectively and individually, all current and former owners or holders of royalty or overriding royalty interests (and the respective heirs, successors, and assigns of each) whose interests bear upon or have borne upon the working interest now or formerly owned by the Excluded Persons named and

described in the preceding sentence, save and except for current and former owners or holders of royalty or overriding royalty interests (and the respective heirs, successors, and assigns of each) whose interests bear upon or have borne upon the working interests now or formerly owned by Kinder Morgan CO_2 Company, Mobil Producing Texas & New Mexico Inc., or their respective affiliated and related companies.

q. "Included Small Share Working Interest Owners" shall mean, collectively and individually, small share working interest owners in the Unit except and excluding (a) such small share working interest owners who are Excluded Persons and (b) such small share working interest owners who opt out of this Settlement in accordance with the terms of this Agreement.

r. "Kinder Morgan" shall mean Kinder Morgan CO_2 Company, L.P. and, from and after January 1, 1998, Shell CO_2 Company, Ltd.

s. "Kinder Morgan Releasees" shall mean, collectively and individually, Kinder Morgan, its current and former parent companies, its current and former sister companies, its current and former affiliated companies, its current and former subsidiary companies, and their respective predecessors, successors, successors in interest, assigns, operating divisions, officers, directors, employees, managers, attorneys, agents, general partners, limited partners, shareholders, investors, joint venturers, and insurers. Without limiting the foregoing in any way, the term "Kinder Morgan Releasees" shall mean and include Kinder Morgan CO_2 Company, L.P., Kinder Morgan, Inc., Kinder Morgan G.P. Inc., Kinder Morgan Energy Partners,

L.P., Kinder Morgan Management, LLC, and Shell CO_2 Company, Ltd.

t. "Mobil" shall mean Mobil Oil Corporation, Mobil Producing Texas & New Mexico, Inc., Mobil Exploration and Producing, U.S., and Exxon Mobil, Inc.

u. "Mobil Releasees" shall mean, collectively and individually, Mobil, its current and former parent companies, their respective current and former sister companies, their respective current and former affiliated companies, their respective current and former subsidiary companies, and their respective predecessors, successors, successors in interest, assigns, operating division, officers, directors, employees, managers, attorneys, agents, general partners, limited partners, shareholders, investors, joint venturers, and insurers. Without limiting the foregoing in any way, the term "Mobil Releasees" shall mean and include Mobil Oil Corporation, Mobil Producing Texas & New Mexico, Inc., Mobil Exploration and Producing, U.S., Mobil Cortez Pipeline, Inc., Exxon Mobil Corporation, and Exxon Mobil Inc.

v. "Plaintiffs" shall mean Ainsworth, the Ainsworth Named Plaintiffs, the CO_2 Claims Plaintiffs, Rutter, the Rutter Named Plaintiffs, Watson, and the Watson Named Plaintiffs.

w. "Released Claims" shall mean and include any and all Claims that are, were, or could have been asserted in the Settled Actions or that could be asserted in the future that arise from conduct, actions, activities, policies, statements, transactions, decisions, acts, or omissions that occurred prior to the execution hereof and that involve issues similar in any way to, or are related in any manner to, issues that were raised or that could have been raised

in the Settled Actions, including, without limitation, the following: (a) the calculation and/or payment of royalties, overriding royalties, revenues, or other payments to Plaintiffs or the Class Members through the date on which the Settlement becomes Final; (b) the marketing, sale, taking in-kind, exchanging, or any other dispositions of CO_2 produced from the Unit through the date on which the Settlement becomes Final, (c) the pricing or valuation of CO_2 produced from the McElmo Dome Unit through the date on which the Settlement becomes Final; (d) the sale, pricing or valuation of CO_2 in end use markets including the Permian Basin in West Texas and New Mexico through the date on which the Settlement becomes Final; (e) the organization and structure of Cortez; (f) the transportation of gas on the Cortez Pipeline tariff through the date on which the Settlement becomes Final; (g) the Cortez Pipeline tariff through the date on which the Settlement becomes Final; (h) the transportation and marketing of CO_2 produced from the Unit and any and all costs, expenses, charges, deductions, liabilities, accounting practices, and calculations associated with same through the date on which the Settlement becomes Final; (i) the bidding for and acquisition of leases in the lands that comprise the Unit; (j) the facts asserted in or underlying the Settled Actions; (k) the Unit Agreement, Unit Operating Agreement, leases, assignments, and other instruments under which Plaintiffs and Class Members hold or purport to hold interests in the Unit; and (l) the administration of this Settlement, including any activities of or actions taken by the Settlement Administrator.

x. "Rutter" shall mean Rutter and Wilbanks Corporation who is a plaintiff in the Rutter Lawsuit and is the Class Representative for the Rutter Class Members.

y. "Rutter Class Members" shall mean and include, collectively and individually, Rutter and all current and former owners or holders of overriding royalty interests in the Unit (and the respective heirs, successors, and assigns of each) whose overriding royalty interests bear upon or have borne upon working interests now or formerly owned or held by Shell, Kinder Morgan, Mobil, or Included Small Share Working Interest Owners save and except for (a) any owners of overriding royalty interests who ace [sic] CO_2 Claims Plaintiffs, (b) any owners of overriding royalty interests who opt out of this Settlement in accordance with the terms of this Agreement, (c) the Rutter Named Plaintiffs, and (d) any Excluded Persons as defined in this Agreement.

z. "Rutter Lawsuit" shall mean the lawsuit styled *Rutter & Wilbanks Corp., et al. v. Shell Oil Company, Shell Western E&P Inc., Shell CO_2 Company, Ltd, et al.*, No. 00-[illegible]-1854; In the United States District Court, District of Colorado.

aa. "Rutter Named Plaintiffs" shall mean Jerry L. Allen; Walter K. Arbuckle Trust (and its trustees); Alfred O. Brehmer Trust (and its trustees); Erwin J. Ekeland; Michael J. Harvey, Jr.; Jaco Production Company; Ken Kamon; Key Production Company (successor to Raymond Chorney and Joan Chorney); John Mathis; Elliott A. Riggs; Gordon Tanner; William R. Thurston, Trustee (and the William R. Thurston Trust); Charles R. Wiggins and Elaine Wolf, and their respective successors or successors-in-interest, heirs, and assigns.

bb. "Settled Actions" shall mean, collectively and individually, the Ainsworth Lawsuit, the CO_2 Claims Lawsuit, the Rutter Lawsuit, and the Watson Lawsuit.

cc. "Settlement" shall mean the terms and conditions of the settlement set forth in this Agreement.

dd. "Settlement Administrator" shall mean a settlement administrator to be appointed by the Court upon the recommendation of Plaintiffs' Counsel to perform certain services related to the administration of the Settlement as described hereinafter.

ee. "Settlement Fund" shall mean the sums contributed by Defendants pursuant to sections 3.1.1 and 3.1.2 under the terms of this Agreement. The term "Settlement Fund" is used for convenience only and the Parties acknowledge that additional consideration is provided under the terms of this Agreement as a result of the provisions in section 3.1.3 and sections 4.1.1 through 4.1.17.

ff. "Shell" shall mean Shell Oil Company, SWEPI LP d/b/a Shell Western E&P (and f/k/a Shell Western E&P Inc), and, through and including April 4, 2000, Shell CO_2 Company, Ltd.

gg. "Shell Releasees" shall mean, collectively and individually, Shell, its current and former parent companies, their respective current and former sister companies, their respective current and former affiliated companies, their respective current and former subsidiary companies, and their respective predecessors, successors, successors in interest, assigns, operating divisions, officers, directors, employees, managers, attorneys, agents, general partners, limited partners, shareholders, investors, joint venturers, and insurers, Without limiting the foregoing in any way, the term "Shell Releasees" shall mean and include Shell Oil Company, SWEPI LP d/b/a Shell Western E&P, Shell Western E&P Inc., Shell Cortez Pipeline Company, Shell Western Pipelines Inc., Shell CO_2 General LLC, Shell CO_2

LLC, Shell Onshore Ventures Inc., Shell Frontier Oil & Gas, Inc., Shell Land & Energy Company, Altura Energy Ltd, Shell Everest, Inc., Shell K2, Inc., and Shell CO_2 Company, Ltd.

hh. "Unit Agreement" shall mean that certain Unit Agreement for the Development and Operation of the McElmo Dome (Leadville) Unit, Counties of Montezuma and Dolores, State of Colorado, that was executed by Shell Oil Company, as Unit operator, on or about October 6, 1982, as amended or modified pursuant to the provisions of same.

ii. "Unit Operating Agreement" shall mean that certain Unit Operating Agreement for the McElmo Dome (Leadville) Unit, Counties of Montezuma and Dolores, State of Colorado, that was executed by Shell Oil Company, as Unit operator, on or about November 30, 1982, as amended or modified pursuant to the provisions of same.

jj. "Watson" shall mean Thomas E. Watson who is a plaintiff in the Watson Lawsuit and is the Class Representative for the Watson Class Members.

kk. "Watson Class Members" shall mean and include, collectively and individually, Watson and all current and former owners or holders of small share working interests in the Unit (and the respective heirs, successors, and assigns of each) save and except for (a) small share working interest owners who are CO_2 Claims Plaintiffs, (b) small share working interest owners who opt out of this Settlement in accordance with the terms of this Agreement, (c) the Watson Named Plaintiffs, and (d) small share working interest owners who are Excluded Persons as defined in this Agreement.

ll. "Watson Lawsuit" shall mean the lawsuit styled *Thomas E. Watson, et al. v. Shell Oil Company, Shell Western E&P Inc., Shell CO_2 Company, Ltd.,. et al.*, No. 00-Z-1855; In the United States District Court, District of Colorado.

mm. "Watson Named Plaintiffs" shall mean Ingrid Black; Cardinal Oil & Gas, Inc.; Ben Donegan; Michael C. Donegan; El Dorado Investments; James H. Essman; Fairview Cemetery District; Louise L. Howard; Jaco Production Company; Georgia L. Johnson; Ken Kamon; Key Production Company (successor to Raymond Chorney and Joan Chorney); Joseph H. Lanier; Robert D. Lanier; Roger F. Lanier Revocable Trust; Mary Ellen Myirea; Nancy June Nolan; Michael L. Reed; Peggy L. Reed (now Reichenau); Eric B. Wells; Kevin C. Wells; Charles R. Wiggins; Wood Oil Company; and their respective successors, successors-in-interest, heirs, and assigns.

DATED at Denver, Colorado this 6 day of May, 2002.

BY THE COURT:

/s/ Zita Weinshienk
ZITA L. WEINSHIENK,
Senior Judge
United States District Court

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinshienk

Case No. 00-Z-1856 (MJW)

MARGARET ANN AINSWORTH, et al.,

Plaintiffs,

vs.

SHELL OIL COMPANY, et al.,

Defendants.

FINAL JUDGMENT

(Filed May 6, 2002)

Pursuant to this Court's Order dated December 6, 2001, the Joint Motion for Final Approval of Class Action Settlement and Related Orders and other motions concerning approval of the settlement agreement dated September 24, 2001 ("Settlement Agreement") came to be heard on April 8, 2002, due and adequate notice having been given of such motions. The Court having considered all papers filed herein and in related Case Nos. 96-Z-2451, 00-Z-1854, and 00-Z-1855 and otherwise being fully informed in the premises, and pursuant to the findings of fact and conclusions of law made orally by the Court on April 8, 2002 and such additional findings of fact and conclusions of law made in writing thereafter,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Terms used in this judgment have the meaning set forth in paragraph 12 hereof As used herein (a) "Settling Parties" shall mean the Ainsworth Class Members, the Ainsworth Named Plaintiffs, and the Defendants and (b) "Settling Party" refers to one of the Settling Parties.

2. This Court has jurisdiction over the subject matter of this action and over all parties to this action, including all class members who are Settling Parties, for the purpose of approving the settlement set out in the Settlement Agreement and otherwise.

3. Pursuant to Fed. R. Civ. P. 23, this Court hereby finally approves the Settlement set forth in the Settlement Agreement and makes final the conditional certification of the class set forth in the Court's Order dated December 6, 2001, which class is hereby defined as the Ainsworth Class Members.

4. The Court hereby dismisses all claims and causes of action herein with prejudice. Costs shall be borne by the party, including any Settling Party, incurring the same except as otherwise provided in the Settlement Agreement.

5. The Court finds that the Settlement set forth in the Settlement Agreement is in all respects fair, reasonable, and adequate to each of the Settling Parties, including the Ainsworth Class Members who are Settling Parties, and the Settling Parties are hereby directed to perform its terms.

6. Plaintiffs' Counsel, Ainsworth Named Plaintiffs, and each of the Ainsworth Class Members who are Settling Parties are deemed to have, and by operation of this

judgment and in accordance with the terms of the Settlement Agreement have, fully, finally, and forever released, relinquished, and discharged all Released Claims against the Defendant Releasees and further have made a covenant not to sue the Defendant Releasees with respect to the Released Claims. None of the Ainsworth Named Plaintiffs or the Ainsworth Class Members who are Settling Parties, either directly, representatively, or in any other capacity, shall hereafter commence or prosecute any action or proceeding in any court or tribunal against Defendant Releasees with respect to any of the Released Claims.

7. The notice given to putative class members of this Settlement and other matters set forth in the Settlement Agreement was the best notice practicable under the circumstances, including the individual notice to all putative class members who could be identified through reasonable effort and the publication notice. Said notice provided due and adequate notice of these proceedings and of the matters therein, including the proposed Settlement set forth in the Settlement Agreement, to all persons entitled to such notice, and said notice fully satisfied the requirements of Fed. R. Civ. P. 23 and the requirements of due process.

8. The passage of title and ownership of the Settlement Fund in accordance with the terms and provisions of the Settlement Agreement is approved.

9. Except as otherwise provided in the Settlement Agreement, each of the Settling Parties, their agents, employees, and counsel shall not be liable for anything done or omitted to be done in connection with these proceedings, the entry of this judgment, or the administration of the

payments to eligible claimants as provided in the Settlement Agreement and this judgment.

10. Without affecting the finality of this judgment in any way and subject to the arbitration provisions of the Settlement Agreement, this Court hereby retains continuing jurisdiction over (a) implementation of this Settlement and any award or distribution of the Settlement Fund, including interest earned thereon, (b) allocation and disposition of amounts of and from the Settlement Fund, and (c) all Settling Parties for the purpose of enforcing and administering the Settlement Agreement and this final judgment.

11. There is no just reason for delay and, therefore, pursuant to Fed. R. Civ. P. 54(b), the Clerk of the Court is hereby ordered to enter this final judgment.

12. The definitions set out below are taken from the Settlement Agreement and are intended to have the same meaning as set out in the Settlement Agreement.

a. "Agreement" means the Settlement Agreement.

b. "Ainsworth" means Margaret Ann Ainsworth who is a plaintiff in the Ainsworth Lawsuit and the Class Representative for the Ainsworth Class Members.

c. "Ainsworth Class Members" shall mean and include, collectively and individually, Ainsworth and all current and former owners or holders of royalty interests in the Unit (and the respective heirs, successors, and assigns of each) whose royalty interests bear upon or have borne upon working interests now or formerly owned or held by Shell, Kindor Morgan, Mobil, or included Small Share Working Interest Owners save and except for (a) any owners of royalty interests who are CO_2 Claims

Plaintiffs, (b) any owners of royalty interests who opt out of this Settlement in accordance with the terms of this Agreement, (c) the Ainsworth Named Plaintiffs, and (d) any Excluded Persons as defined in this Agreement.

d. "Ainsworth Lawsuit" shall mean the lawsuit styled *Margaret Ann Ainsworth, et al. v. Shell Oil Company, Shell Western E&P Inc., Shell CO_2 Company, Ltd.*, et al., No. 00-Z-1856; in the United States District Court, District of Colorado.

e. "Ainsworth Named Plaintiffs" shall mean, collectively and individually, the following: Dixie Alexander; Lyle J. Aulston; Betty L. "Mickie" Baker; Nelda Lee Barlow; Louise Bemis; Mary Neoma Bertrand; Ingrid Black; Olivia Carson, LLC; Jerry Chaffin; Dorothy Chaffin; Dorothy Gail Chappell; John Larry Clark; Julia L. Crow; Clara Cundiff; Ladora Davis; Edwin O. Duran; Johnnie E. Duran; Victor Duran; H. Jean Elder; Arthurene Edna Elisworth; Margaret Faruggia (now Lyon); Michael J. Faruggia; Sarah L. Foust; Barbara E. Glazner; John H. Glazner; Eva Gorsuch; Ina F. Gray; Louis M. Gray; Ingrid Joann Hartley; Wanda Heathman; Estate of Velma Louise Henderson; Louise L. Howard; Jaco Production Company; Edith Delight James; Georgia L. Johnson; Ken Kamon; Laura H. (aka "L") Kennedy; Margaret Kroeger; John O. Lancaster; Lois Lancaster; N. Elaine Lancaster; William A. Lancaster; Joseph H. Lanier; Robert D. Lanier; Roger F. Lanier Revocable Trust; Kip E. Makeever; Michele Ann Makeever (now Kruse); Lois M. Martin; Charles M. McAfee & Company; John H. Miller; Idene Minchin; Mary E. Murphy; Dee Renay Neely; Hazel S. Neely; Leroy Oliver; S. Ellen Oliver; Farmers Home Administration for the Account of Leroy Oliver; Troy M. Oliver; W. Shorlene Oliver; Jimmie R. Perry; Roy L.

Plemons; Poverty Point Properties, LP; Kelly Snow; Joe D. Tipton, Jr.; Merrie Tipton; Scott R. Tipton, Non-Exempt Trust; Betty Wells; Charles R. Wiggins; Mark Wilson and Timothy A. Wilson, and their respective successors or successors-in-interest heirs, and assigns.

f. "Claims" shall mean and include any and all causes of action, choses in action, demands, debts, obligations, duties, liens, liabilities, and theories of liability of whatsoever kind and nature, whether based in contract or tort, whether arising in equity or under the common law, whether by statute or regulation, whether known or unknown, whether asserted in the past, present, or fixture, whether contingent, prospective, or matured, whether for damages relief, injunctive relief, declaratory relief, equitable relief, or any other type of relief, whether for actual damages, liquidated damages, punitive damages, exemplary damages, compensatory damages, incidental damages, consequential damages, pecuniary damages, costs, expenses, attorneys' fees, penalties, or fines. Without limiting the foregoing in any way, the term "Claims" includes, but is not limited to, any and all matters and theories that were asserted or that might have been asserted in the Settled Actions. Without limiting the foregoing in any way, the term "Claims" includes, but is not limited to, Claims that Plaintiffs, Plaintiffs' Counsel, the Crowley Plaintiff, and the Class Members, or any of them, do not know or suspect to exist in their favor at the time of the execution of this Agreement and that, if known, might have affected the Settlement, the releases set forth in this Agreement, or any other action including, but not limited to, the decision to participate in or object to the Settlement.

g. "Class Members" shall mean and include, collectively and individually, the Ainsworth Class Members, the Rutter Class Members, and the Watson Class Members.

h. "CO_2 Claims Plaintiffs" shall mean and include, collectively and individually, the following persons and entities: A.L.K.S.K. Family Limited Partnership; Alco Petroleum, Inc., Jerry L. Allen, President; James E. Anthony; Russel and Lolita Aulston; William Beard, Beard Oil Company; Dalton and Lasell Becker; Faye Bertrand; H. L., Bigler Irrevocable Trust, Ann Bullwinkle, Trustee; Nellie Bradfield; Billie Carrbello; Chandler Chaffin; Elsie Chaffin; Sidney R. Clarke, Marjorie Crowley; Roberta Davis; Jacqueline Dobbins; Karl E. Donovan; Bernice Duncan; William C. Duncan; Nancy Conrad Erwin; Martha Fans; R. C. Gerlach; Leon and Yvonne Gilliland; Louise Hicks; Leland A. Hodges; Glen and Lois Hudgeons; Edgar S. Hummel '81 Trust, c/o Cynthia Gotto, Vice President, Union Bank of California Trust Dept.; Peter K. Hummei 81 Trust, c/o Cynthia Gotto, Vice President, Union Bank of California Trust Dept.; Virginia M. Hummel '81 Trust, c/o Cynthia Gotto, Vice President, Union Bank of California Trust Dept.; Hazel Jacobs; Lanier Farms, Inc., Robert Lanier; Roy and Georgia Leavitt; O. P. Leonard, Jr.; Leonard Enterprises, Inc.; Virginia A. Leonard, individually and as Trustee of the Virginia Leonard Marital Trust; Albert G. Mahaffey; Charles L. Mahaffey; Mahaffey Bros.; Mahaffey Enterprises, Inc.; Joe L. Mahaffey; (Mahaffey Bros.); Mary Ellen McComb; Godwin Oliver; Harry Ptasynski; Stuart Porter; Florence Randles; Daisy M. Reed Trust (Daisy Ives Reed) Susan Peters Trustee; Jeanne Reed; Reed and Sons, Inc.; Reed Freedom, Inc.; Wagon Wheel Land and Cattle, Inc.; Bridwell Oil Company, Gary Shores, Trustee; John H.

Skidmore; Tidelands Energy Co.; Peter Hummel; Dwight and Jackie Wallace; Bill D. Watson; Cecii W. Watson; U/W of Anna W. Gai, Mr. Terry Oliver, Vice President & Trust Officer, Wells Fargo Bank; U/W of Terenzio Gai; F/B/O Silvia G. Painton, Mr. Terry Oliver, Vice President & Trust Officer, Wells Fargo Bank; U/W of Terenzio Gai; F/B/O Angela G. Odell Trust, Mr. Terry Oliver Vice President & Trust Officer, Wells Fargo Bank; U/W of Terenzio Gai; F/B/O Margory F. Gai Trust; Mr. Terry Oliver, Vice President & Trust Officer, Wells Fargo Bank; U/W of Harry A. Macintosh Trust; Mr. Terry Oliver, Vice President & Trust Officer, Wells Fargo Bank; Berenice J. Bradshaw Marital Trust; Mr. Terry Oliver, Vice President & Trust Officer, Wells Fargo Bank; Franklin J. Bradshaw Family Trust; Mr. Terry Oliver, Vice President & Trust Officer, Wells Fargo Bank; Berenice J. Bradshaw Revocable Trust; Mr. Terry Oliver, Vice President & Trust Officer, Wells Fargo Rank [sic]; Arthur and Esther Wilson (Wilson Bros.); Elza Wilson; James and Veda Wilson (Wilson Bros.); Marie E. Wilson; Marie E. Wilson, Trustee; Paul Wilson Family Trust, Barbara Burke, Trustee; Eldon Zwicker; Dalton A. Becker; B. Bradshaw Revocable Trust, Pursuit Energy Corporation; Andrews Royalty, Inc.; B. J. Bradshaw Marital Trust; Magic M&R, L.L.C.; ROEC, Inc.; Richard Altman & Company; F. J. Bradshaw; Chandler Chaffin (Walter Ertel); Elsie F. Chaffin; Nancy Conrad; Roberta L. Davis; Karl Donovan; Nellie Donovan; Berniece E. Duncan Trust (and its trustees); William C. Duncan Trust (and its trustees); Hazel L. Jacobs Englehart; Martha Paris (Edwin Wilson); Anna Gai; Terenzio Gai; Lois Gerlach; Etha Gilliland Estate (Patterson); Lillie Hartle; Lester Hartle; Lloyd E. Hartle; Elizabeth V. Harclerode; Donnis DuCray; Virginia M. Hickey Trust; Roy R. Leavitt, June C. Leavitt; Sheryl A. Ives White;

Sheryl Ives; Obie Leonard, Jr.; PANAN Energy, Inc.; R.W. Leonard Estate; VML Resources, Inc.; Harry Macintosh; John J. Wafer; Chad A. Macintosh; Richard A. Macintosh; Charlene R. Auvil; Daniel D. Dove; Mary L. Adkisson; Patrick A. Macintosh; James B. Macintosh; Mahaffey Enterprises; C. L. Mahaffey; Daisy Mahaffey; Mary Ellen McComb (E. Wilson); Godwin Oliver (Ives Farms); Susan Peters; Ralph Peters; Stuart Mac Porter; Sharon Porter; Florence Randles (E. Wilson); Daisy Mae Reed Trust; Jack O. and Jeanne Reed, Trustees; Reed Freedom, Inc.; Wagon Wheel Land & Cattle Company, Inc.; Tidelands Energy; Jackie Elaine Wallace; Dwight Wallace; Billy D. Watson; Marie E. Wilson; S. Glen Wilson Trust, Marie F. Wilson, Trustee; Esther E. Wilson; Arthur A. and Esther Wilson; Elza Wilson (Edwin Wilson); James E. Wilson; PCW Ltd. Partnership.

i. "CO_2 Claims Lawsuit" shall mean the lawsuit styled *CO_2 Claims Coalition, L.L.C. v. Shell Oil Company, Shell Western E&P Inc., Mobil Producing Texas & New Mexico, Inc. and Cortez Pipeline Company*; CA. No. 96-Z-2451; In the United States District Court, District of Colorado.

j. "Cortez" shall mean Cortez Pipeline Company.

k. "Cortez Releasees" shall mean, collectively and individually, Cortez, its current and former owners and/or partners (general or limited), their respective current and former parent companies, their respective current and former sister companies, their respective current and former affiliated companies, their respective current and former subsidiary companies, and their respective predecessors, successors, successors in interest, assigns, operating divisions, officers, owners, directors, employees, managers,

attorneys, agents, general partners, limited partners, shareholders, investors, joint venturers, and insurers.

l. "Crowley Lawsuit" shall mean the lawsuit styled *United States of America, ex rel. Leo Crowley v. Shell Oil Company, Shell Western E&P Inc. Shell CO_2 Company, Ltd., et al.,* No. 00-Z-1220; in the United States District Court for the District of Colorado.

m. "Crowley Plaintiff" shall mean Leo Crowley, the relator in the Crowley Lawsuit, and shall not mean or include the United States of America.

n. "Defendants" shall mean, collectively and individually, Shell, Kinder Morgan, Mobil, and Cortez.

o. "Defendant Releasees" shall mean, collectively and individually, the Shell Releasees the Kinder Morgan Releasees, the Mobil Releasees, and the Cortez Releasees.

p. "Excluded Persons" shall mean and include, collectively and individually, the following individuals and entities, and theft [sic] respective affiliated and related companies; Arco Oil and Gas Company, BP Amoco, Chevron U.S.A., Inc., Kinder Morgan CO_2 Company, Mobil Producing Texas & New Mexico, Inc., Occidental Permian Limited Partnership. Phillips Oil Company, Texaco Exploration & Production, Inc., the State of Colorado, the United States of America, Montezuma County, Dolores County, Colorado municipalities and/or taxing entities, and the heirs, successors or assigns of all of the foregoing with respect to any interests transferred on or after August 8, 2001. In addition to the foregoing, the term "Excluded Persons" shall also mean and include, collectively and individually, all current and former owners or holders of royalty or overriding royalty interests (and the respective

heirs, successors, and assigns of each) whose interests bear upon or have borne upon the working interests now or formerly owned by the Excluded Persons named and described in the preceding sentence, save and except for current and former owners or holders of royalty or overriding royalty interests (and the respective heirs, successors, and assigns of each) whose interests bear upon or have borne upon the working interests now or formerly owned by Kinder Morgan CO_2 Company, Mobil Producing Texas & New Mexico Inc., or their respective affiliated and related companies.

q. "Included Small Share Working Interest Owners" shall mean, collectively and individually, small share working interest owners in the Unit except and excluding (a) such small share working interest owners who are Excluded Persons and (b) such small share working interest owners who opt out of this Settlement in accordance with the terms of this Agreement.

r. "Kinder Morgan" shall mean Kinder Morgan CO_2 Company, L.P. and, from and after January 1, 1998, Shell CO_2 Company, Ltd.

s. "Kinder Morgan Releasees" shall mean, collectively and individually, Kinder Morgan, its current and former parent companies, its current and former sister companies, its current and former affiliated companies, its current and former subsidiary companies, and their respective predecessors, successors, successors in interest, assigns, operating divisions, officers, directors, employees, managers, attorneys, agents, general partners, limited partners, shareholders, investors, joint venturers, and insurers. Without limiting the foregoing in any way the term "Kinder Morgan Releasees' shall mean and include

Kinder Morgan CO_2 Company, L.P., Kinder Morgan, Inc., Kinder Morgan G.P. Inc., Kinder Morgan Energy Partners, L.P., Kinder Morgan Management, LLC, and Shell CO_2 Company, Ltd.

t. "Mobil" shall mean Mobil Oil Corporation, Mobil Producing Texas & New Mexico, Inc., Mobil Exploration and Producing, U.S., and Exxon Mobil, Inc.

u. "Mobil Releasees" shall mean, collectively and individually, Mobil, its current and former parent companies, their respective current and former sister companies, their respective current and former affiliated companies, their respective current and former subsidiary companies, and their respective predecessors successors, successors in interest, assigns, operating divisions, officers, directors, employees, managers, attorneys, agents, general partners, limited partners, shareholders, investors, joint venturers, and insurers. Without limiting the foregoing in any way, the term "Mobil Releasees" shall mean and include Mobil Oil Corporation, Mobil Producing Texas & New Mexico, Inc., Mobil Exploration and Producing, U.S. Mobil Cortez Pipeline, Inc., Exxon Mobil Corporation, and Exxon Mobil Inc.

v. "Plaintiffs" shall mean Ainsworth, the Ainsworth Named Plaintiffs, the CO_2 Claims Plaintiffs, Rutter, the Rutter Named Plaintiffs, Watson, and the Watson Named Plaintiffs.

w. "Released Claims" shall mean and include any and all Claims that are, were, or could have been asserted in the Settled Actions or that could be asserted in the future that arise from conduct, actions, activities, policies, statements, transactions, decisions, acts, or omissions that occurred prior to the execution hereof and that involve

issues similar in any way to, or are related in any manner to, issues that were raised or that could have been raised in the Settled Actions, including, without limitation, the following: (a) the calculation and/or payment of royalties, overriding royalties, revenues, or other payments to Plaintiffs or the Class Members through the date on which the Settlement becomes Final; (b) the marketing, sale, taking in-kind exchanging, or any other dispositions of CO_2 produced from the Unit through the date on which the Settlement becomes Final, (c) the pricing or valuation of CO_2 produced from the McElmo Dome Unit through the date on which the Settlement becomes Final; (d) the sale, pricing or valuation of CO_2 in end use markets including the Permian Basin in West Texas and New Mexico through the date on which the Settlement becomes Final; (e) the organization and structure of Cortez; (f) the transportation of gas on the Cortez Pipeline through the date on which the Settlement becomes Final; (g) the Cortez Pipeline tariff through the date on which the Settlement becomes Final; (h) the transportation and marketing of CO_2 produced from the Unit and any and all costs, expenses, charges, deductions, liabilities, accounting practices, and calculations associated with same through the date on which the Settlement becomes Final; (i) the bidding for and acquisition of leases in the lands that comprise the Unit; (j) the facts asserted in or underlying the Settled Actions; (k) the Unit Agreement, Unit Operating Agreement, leases, assignments, and other instruments under which Plaintiffs and Class Members hold or purport to hold interests in the Unit; and (l) the administration of this Settlement, including any activities of or actions taken by the Settlement Administrator.

x. "Rutter" shall mean Rutter and Wilbanks Corporation who is a plaintiff in the Rutter Lawsuit and is the Class Representative for the Rutter Class Members.

y. "Rutter Class Members" shall mean and include, collectively and individually, Rutter and all current and former owners or holders of overriding royalty interests in the Unit (and the respective heirs, successors, and assigns of each) whose overriding royalty interests bear upon or have borne upon working Interests now or formerly owned or held by Shell Kinder Morgan, Mobil, or included Small Share Working Interest Owners save and except for (a) any owners of overriding royalty interests who ace [sic] CO_2 Claims Plaintiffs, (b) any owners of overriding royalty interests who opt out of this Settlement in accordance with the terms of this Agreement, (c) the Rutter Named Plaintiffs and (d) any Excluded Persons as defined in this Agreement.

z. "Rutter Lawsuit" shall mean the lawsuit styled *Rutter & Wilbanks Corp., et al. v. Shell Oil Company, Shell Western E&P Inc., Shell CO_2 Company, Ltd., et al.*, No. 00-Z-1854; In the United States District Court, District of Colorado.

aa. "Rutter Named Plaintiffs" shall mean Jerry L. Allen; Walter K. Arbuckle Trust (and its trustees); Alfred O. Brehmer Trust (and its trustees); Erwin J. Ekeland; Michael J. Harvey, Jr.; Jaco Production Company; Ken Kamon; Key Production Company (successor to Raymond Chorney and Joan Chorney); John Mathis; Elliott A. Riggs; Gordon Tanner; William R. Thurston, Trustee (and the William R. Thurston Trust); Charles It [sic] Wiggins and Elaine Wolf, and their respective successors or successors-in-interest, heirs, and assigns.

bb. "Settled Actions" shall mean, collectively and individually, the Ainsworth Lawsuit, the CO_2 Claims Lawsuit, the Rutter Lawsuit, and the Watson Lawsuit.

cc. "Settlement" shall mean the terms and conditions of the settlement set forth in this Agreement.

dd. "Settlement Administrator" shall mean a settlement administrator to be appointed by the Court upon the recommendation of Plaintiffs' Counsel to perform certain services related to the administration of the Settlement as described hereinafter.

ee. "Settlement Fund" shall mean the sums contributed by Defendants pursuant to sections 3.1.1 and 3.1.2 under the terms of this Agreement. The term "Settlement Fund" is used for convenience only and the Parties acknowledge that additional consideration is provided under the terms of this Agreement as a result of the provisions in section 3.1.3 and sections 4.1.1 through 4.1.17.

ff. "Shell" shall mean Shell Oil Company, SWEPI LP d/b/a Shell Western E&P (and f/k/a Shell Western E&P Inc.), and, through and including April 4, 2000, Shell CO_2 Company, Ltd.

gg. "Shell Releasees" shall mean, collectively and individually, Shell, its current and former parent companies, their respective current and former sister companies, their respective current and former affiliated companies, their respective current and former subsidiary companies, and their respective predecessors, successors, successors in interest, assigns, operating divisions, officers, directors, employees, managers, attorneys, agents, general partners, limited partners, shareholders, investors, joint venturers, and insurers. Without limiting the foregoing in any way,

the term "Shell Releasees" shall mean and include Shell Oil Company, SWEPI LP d/b/a Shell Western E&P, Shell Western E&P Inc., Shell Cortez Pipeline Company, Shell Western Pipelines Inc., Shell CO_2 General LLC, Shell CO_2 LLC, Shell Onshore Ventures Inc., Shell Frontier Oil & Gas, Inc., Shell Land & Energy Company, Altura Energy Ltd., Shell Everest, Inc., Shell K2, Inc., and Shell CO_2 Company, Ltd.

hh. "Unit Agreement" shall mean that certain Unit Agreement for the Development and Operation of the McElmo Dome (Leadville) Unit, Counties of Montezuma and Dolores, State of Colorado, that was executed by Shell Oil Company, as Unit operator, on or about October 6, 1982, as amended or modified pursuant to the provisions of same.

ii. "Unit Operating Agreement" shall mean that certain Unit Operating Agreement for the McElmo Dome (Leadville) Unit, Counties of Montezuma and Dolores, State of Colorado, that was executed by Shell Oil Company, as Unit operator, on or about November 30, 1982, as amended or modified pursuant to the provisions of same.

jj. "Watson" shall mean Thomas E. Watson who is a plaintiff in the Watson Lawsuit and is the Class Representative for the Watson Class Members.

kk. "Watson Class Members" shall mean and include, collectively and individually, Watson and all current and former owners or holders of small share working interests in the Unit (and the respective heirs, successors, and assigns of each) save and except for (a) small share working interest owners who are CO_2 Claims Plaintiffs, (b) small share working interest owners who opt out of this

Settlement in accordance with the terms of this Agreement, (c) the Watson Named Plaintiffs, and (d) small share working interest owners who are Excluded Persons as defined in this Agreement.

ll. "Watson Lawsuit" shall mean the lawsuit styled *Thomas E. Watson, et al. v. Shell Oil Company, Shell Western E&P Inc., Shell CO_2 Company, Ltd., et al.*, No. 00-Z-1855; in the United States District Court, District of Colorado.

mm. "Watson Named Plaintiffs" shall mean Ingrid Black; Cardinal Oil & Gas, Inc.; Ben Donegan; Michael C. Donegan; El Dorado Investments; James H. Essman; Fairview Cemetery District; Louise L. Howard; Jaco Production Company; Georgia L. Johnson; Ken Kamon; Key Production Company (successor to Raymond Chorney and Joan Chorney); Joseph H. Lanier; Robert D. Lanier; Roger F. Lanier Revocable Trust; Mary Ellen Myirea; Nancy June Nolan; Michael L. Reed; Peggy L. Reed (now Reichenau); Eric B. Wells; Kevin C. Wells; Charles R. Wiggins; Wood Oil Company; and their respective successors, successors-in-interest, heirs, and assigns.

DATED at Denver, Colorado this 6 day of May, 2002.

BY THE COURT:

/s/ Zita L. Weinshienk
ZITA L. WEINSHIENK,
Senior Judge
United States District Court

EOD
UNITED STATES
DISTRICT COURT
DENVER, COLORADO

MAY 06 2002

JAMES R. MANSPEAKER

TEXT OF CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 96-Z-2451

CO2 CLAIMS COALITION,

Plaintiff,

vs.

SHELL OIL COMPANY, *et al.*,

Defendants.

REPORTER'S TRANSCRIPT
(Settlement Hearing)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 9:12 a.m., on the 8th day of April, 2002, in Courtroom C-400, United States Courthouse, Denver, Colorado.

Proceeding Recorded by Mechanical Stenography, Transcription Produced via Computer by Paul Zuckerman, 1929 Stout Street, P.O. Box 3563, Denver, Colorado, 80294, (303) 629-9285

[2] **APPEARANCES**

JOHN COGSWELL, Attorney at Law, 415 East Main Street, P.O. Box 1420, Buena Vista, Colorado, 81211; MICHAEL HEAPHY and DAVID HJELMFELT, Attorneys at Law, 1600 Stout Street, Suite 1905, Denver, Colorado, 80202, and LEO CROWLEY, 520 North Humphreys, P.O. Box 1928, Flagstaff, Arizona, 86002, appearing for the plaintiffs.

PHILLIP D. BARBER, Attorney at Law, 1700 Broadway, Suite 1800, Denver, Colorado, 80290, and KENT SULLIVAN, Attorney at Law, 2600 Grand Avenue, Kansas City, Missouri, 64108-4606, appearing for Defendant Cortez Pipeline.

JOHN SHEPHERD, Attorney at Law, 555 17th Street, Suite 3200, Denver, Colorado, 80202-8749, and ANDREW McCOLLAM III, Attorney at Law, 2300 First City Tower, 1001 Fannin Street, Houston, Texas, 77002-6760, appearing for the Shell Defendants and Kinder Morgan.

MICHAEL WILLIAMS, Attorney at Law, Suite 1700, 950 17th Street, Denver, Colorado, 80202; and ROBERT YOULE, Attorney at Law, Suite 2450, 950 17th Street, Denver, Colorado, 80202, and SHANNON RATLIFF, Attorney at Law, 816 Congress Avenue, Suite 1900, Austin, Texas, 78701, appearing for Defendant Mobil.

JAMES LYONS and SCOTT BROWNING, Attorneys at Law, Suite 3000, 1200 17th Street, Denver, Colorado, 80202, Fairness Experts.

[3] JEAN DUBOFSKY, Attorney at Law, 1000 Rose Hill Drive, Boulder, Colorado, 80302; DEAN NEUWIRTH, Attorney at Law, 1800 15th Street, Suite 105, Denver, Colorado, 80202, and GARY CRUCIANI, Attorney at Law, 300 Crescent Court, Suite 1500, Dallas, Texas, 75201, appearing for Objectors.

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PROCEEDINGS

(In open court at 9:12 a.m.)

THE COURT: Be seated.

THE COURTROOM DEPUTY: The matters now before the Court, Civil Action No. 96-Z-2451, CO2 Claims Coalition vs. Shell Oil Company, *et al.*, and related cases 00-Z-1854, 00-Z-1855, 00-Z-1856, and 00-Z-1220.

THE COURT: Good morning.

As always, we will start with making a record of who appears. And we'll start with plaintiffs. Mr. Cogswell.

MR. COGSWELL: Good morning, your Honor. John Cogswell, Leo Crowley, David Hjelmfelt, and Michael Heaphy, attorneys for the plaintiffs.

We also have present today the managers of the Coalition, Mr. Mahaffey, Mr. Beard, and Mr. Clark. We also have today present the class representatives, though I notice Tom Watson, the member of the class rep for the Watson case, is not yet here. But we have Mr. Rutter and Mrs. Ainsworth, and Mr. Lyons, the expert for the classes.

[4] *THE COURT:* Thank you.

MR. COGSWELL: One other one, your Honor. We have Mr. Gene Kennedy, who is the representative of Poorman Douglas, the class administrator.

THE COURT: Thank you. Okay. And attorneys for defendants. And Mr. Shepherd, do you want to – maybe you can just review everybody.

MR. SHEPHERD: Okay. I hope I can.

THE COURT: Well, if not –

MR. SHEPHERD: John Shepherd, and Drew McCollam for defendants Shell and Kinder Morgan CO2 Company.

Mike Williams and Rob Youle and Shannon Ratliff for defendant Mobil.

And Kent Sullivan and Phil Barber for Cortez Pipeline Company.

THE COURT: I also note that Mr. Lyons is present, the fairness expert, and – I'm sorry.

MR. LYONS: This is my partner, Scott Browning.

THE COURT: Scott Browning. Thank you. And would also note that we have representatives from various objectors.

Before we get started with any comments, statements, there is a couple matters of course that I'd like to take up, housekeeping matters.

We have plaintiffs' amendment to motions, which the Court will treat as a motion to amend and will grant. I think [5] that's a housekeeping matter.

We have objectors' motion for leave to reply to the response to their objections. That was filed April 5. We'll grant that.

And a motion for leave to file reply in support of Tidelands' objections to proposed settlement objection. We'll grant that.

I need to mention that there were filed this morning at 9:01 and 9:02 some papers which I have not had opportunity to look at. And I can't possibly consider things that are filed at the very last minute right before a hearing. They're entitled Objectors' Motion for Leave to Submit Supplemental Written Proffer and Supplemental Exhibits

in Support of Objectors' Objections. And the Court will deny that motion as filed untimely. And the supplemental exhibits aren't a motion, but I would simply say that I don't have time to read something filed a minute or two after the date or time that this hearing was started.

Let me start out by saying that I have read very carefully Mr. Lyons' affidavit addressing proposed class action settlement. He has several suggestions and recommendations. This was filed April 2.

I find his affidavit and his recommendations to be thorough and thoughtful. I agree with his suggestions. And if, indeed, the settlement is approved this morning, as you [6] know I might – I must honestly say it probably will be after all of this time and all this review by the numerous people and all the papers filed – that his suggestions will be adopted. And if we need to tweak or modify some of these figures or motions to take into account his suggestions, then that will have to be done.

I especially want to note for the record that he recommends that the cash consideration to be paid to the classes should be increased by approximately $1.2 million. And the Court agrees that that should be done.

Now, this may be out of the named plaintiffs' part of it, or if that's a problem, I suppose it can be taken out of the attorneys' fees. It wasn't suggested by Mr. Lyons that it comes out of the attorneys' fees; but if there is no other place to take it, that's perhaps where it should come.

I'll let you comment on that.

There is also another figure which I think now is changed. It was the amount to place the class representatives in the same position as the named plaintiffs, and the

classes were expected to pay approximately $102,057. In Mr. Lyons' opinion, this is unprecedented and should be rejected. If there is going to be this amount paid, then again it should be worked out between the – well, it's suggested that it could be worked out and paid by the named plaintiffs or the Coalition, or I would just add perhaps by attorneys' fees.

[7] The amount of 18,550, he points out, is supported by well-established precedent and is reasonable. I don't have a problem with that, and I agree with his position on that.

So these are some changes that have been suggested in Mr. Lyons' affidavit and it appears to me that they are thoughtful and that I should certainly give them very serious consideration.

There are a lot of other positions that are taken, and we can talk about that as we go.

I do want to say one other thing before we get started on any comments or statements, and that is that this case has been going on for a very long time. I would just note that I've heard a little complaint from the objectors about short notice, etc., etc. And all I can say is that there has been notice for a long time that this court might not allow live testimony and would ask for affidavits or proffers.

I would also note that it's been, what, some six years that this court has been dealing with this matter. I'm certainly familiar with the parties, the various parties' positions. I am familiar with the objectors' objections. I've reviewed the file, the case law over and over. I won't say *ad nauseum*, but that's almost how I feel.

This case was initially – the settlement was initially, the beginnings of it, put together by an esteemed former justice of the Supreme Court, Justice Kirschbaum. It [8] has been looked at carefully by one of our very fine magistrate judges, Mike Watanabe. We have a highly respected and experienced attorney, Jim Lyons, as the fairness expert. And after all of these people have gone over this material, this court has reviewed and reviewed everything, including all of the arguments stated by the objectors.

So I would just start out by saying initially I'm going to listen to what people have to say, but I'm not going to hear any testimony by objectors. I know what that testimony is going to be. I know what the objections are, and I've reviewed the proffered testimony, so I don't think that hearing it is going to make any difference, because it's all before me.

We will start out this morning, unless somebody has a different idea, by hearing what plaintiffs' attorney wants to state. And I would be interested, Mr. Cogswell, what you want to say about Mr. Lyons' suggestions for modification.

MR. COGSWELL: Thank you, your Honor.

If it please the Court, I'd like to begin with the notice, which this hearing is in response to.

THE COURT: And how long will your comments be?

MR. COGSWELL: I'm going to say about 15 minutes, your Honor.

THE COURT: Good. Okay.

MR. COGSWELL: If that would be all right.

The notice says that this hearing will be conducted [9] for the purpose of determining whether the proposed settlement is fair, reasonable, and adequate, and whether it should be approved by the Court; second, whether final judgment should be entered dismissing the settled actions with prejudice, and (3) whether application -- applications of class counsel for the awards and reimbursements discussed in this notice should be approved. Those awards and reimbursements discussed are set forth above and pertain to attorneys' fees and the amounts set aside for the administration fund, which are the two principal numbers which will determine the net settlement available for distribution to the classes.

The notice continues that no person shall be heard unless his or her objection or opposition is made in writing and is filed together with all copies of all other papers and briefs by him or her with the clerk of the Court no later than January 22 with respect to the first notice – and that was extended to January 25 – and March 22 with respect to the next notice.

The notice continues to say: Unless otherwise ordered by court, any member of the settlement classes who does not make his or her objections or opposition in the manner provided shall be deemed to have waived all objections and opposition to the fairness, reasonableness, and adequacy of the proposed settlement and to the application of class counsel for the awards and reimbursements discussed.

[10] Now, I mention this, your Honor, for two things. One, these latest proffers in our opinion in some respects deal with objections that were never previously raised. These would include their criticism of the conduct of

myself, for example, on Senate Bill 141. I don't think that can be brought up, but I would like to state parenthetically the conduct attributed to me is not true.

Second, none of the objections previously raised the issue of attorneys' fees, and some of the proffered suggestions are directed in that manner. We don't think they should come up.

The proffers also address the conduct of the class representatives, which were not previously raised. We don't think that should come up.

The proffers also, while previously raising the fact that the notice wasn't mailed, suggest that counsel were trying to pull a fast one on the Court by going ahead on February 11, knowing that the mail hadn't gone out properly. That objection is not true and was not raised.

So those are the objections we feel that the proffers suggest should not be considered.

Your Honor, with respect to the final judgment, which was the second thing requested in the notice besides a ruling of fairness, reasonable, and adequacy, the hearing principally comes before the Court on a joint motion for final approval of [11] class action settlement and related orders. And to that document is attached our – are attached the four final judgments in each case.

Now, the principal two things about these judgments – and we're here, your Honor, because we would like these judgments entered – is that the Court finds –

THE COURT: Let me just interrupt you, because you've stated these as final judgments; and when I got to the end of your proffered judgment, because I

couldn't figure out how they could be final judgments, I note that you're acting or proposing them under 54(b), Rule 54(b).

MR. COGSWELL: Yeah.

THE COURT: So they really aren't final judgments of the whole case.

MR. COGSWELL: That is true.

THE COURT: Final judgments of a part of the case.

MR. COGSWELL: Right.

THE COURT: All right. Go ahead.

MR. COGSWELL: And we think the final judgment of the part of the case is the one set forth in paragraph 5 of these proposed final judgments. And I should say, your Honor, these documents are exhibits for the settlement agreement – it was agreed that they would be tendered to the Court at this time.

And basically, it's a finding that the Court deems the settlement fair, reasonable, and adequate to each of the [12] settling parties, including the class members; and the settling parties are hereby directed to perform its terms.

Now, what does the Court have to do to find that the settlement is fair, reasonable, and adequate? There are the four standards of the *Gottlieb* case, your Honor, but basically, the issues that need to be considered in order to enter these so-called "final judgments," which the Court points out are not final for the whole case and do contain the 54(b) allegation. What the Court has to do is satisfactory [sic] itself that the notice was properly given in this

case; that the classes should be certified as preliminarily previously ordered by the Court; that the settlement is fair and reasonable and should be approved, and that the allocation of the settlement proceeds, which I will address later, should be according to specified percentages.

Now, we have those percentages this morning, your Honor, though they're likely to change a little bit because we are still trying to tweak the final numbers with all of the parties. There is no disagreement or dispute. We're all at roughly the same decimal, but the accountants are trying to reconcile their minor variations –

THE COURT: When you're adding these, are you taking the figures that you initially suggested, or the modified figures as suggested by Mr. Lyons in his –

MR. COGSWELL: The figures that I'm going to present [13] to you, your Honor, are as originally, according to the methodology and assigned risk. But I'm prepared to tell the Court exactly what the differences are. And obviously, if the Court wants to adopt Mr. Lyons' views, as it has said it would, then I'll make a proposal regarding that.

However, we believe the issues to enter these final judgments are the ones that I've just described. We believe all other issues relate to the implementation, as opposed to the approval of the settlement. And I will address each of these matters briefly, too, in the remaining time that I have.

Your Honor, we submitted proposed findings to deal with the principal issues in the case, and we also submitted an order to deal with some of the other issues in the case. The proposed findings are lengthy and were not

intended to be the final findings; but the law requires the Court when it enters a final judgment on the settlement here with the 54(b) determination to enter findings of fact and conclusions of law.

The defendants feel that what we did was more than necessary. And I'm just offering to the Court now that if the Court does approve this settlement that we'd be happy to accept directions from the Court to get with the defendants' counsel and come up with agreed-upon findings of fact and conclusions of law that [sic] supported by documents in the record.

With respect to the documents and exhibits in the record, we have submitted three volumes. These documents are [14] largely duplicative of other things that have been filed with the Court; but we would like the Court to realize that we're not limiting ourselves to these three volumes. If there is evidence in the record, then we would incorporate all the evidence in the record.

Your Honor, we believe the settlement and the joint motion should be approved as requested based upon the Court's prior preliminary order and the information and argument submitted in support thereof.

In terms of the other motions, I'd like to now address the motion to amend allocation. This allocation motion, your Honor, based upon the final data and before Mr. Lyons' suggestion, generates a percentage of 42.0901 percent for the Coalition; 34.0490 percent for ARW, the named plaintiffs, and 23.8609 percent for the classes.

Now, Mr. Lyons has said in his affidavit, your Honor, that he would like to increase the participation risk factor

from 75 percent to 85 percent for the classes. What happened when you do that is you get a different risk factor for the classes. It in fact increases from .1406 to .1594. And when you do that you get another $1,187,190 going to the classes.

Now, this number will, too, change, your Honor, once we get the exact settlement amount. But it's going to be very, very close.

The further conclusion of Mr. Lyons is that after [15] reviewing all of the evidence relating to the statute of limitations, he thinks the statute of limitations risks for the named plaintiffs is slightly higher than it is for the Coalition. And that's why he said this 1,108,000 should come from the named plaintiffs because it has to do with the risks of the case.

In that respect, your Honor, I think he would also agree that reasonable people might disagree as to whether he's right or wrong. I happen to disagree, but one – and the reason I disagree is that the objectors in this case and, I think, Mr. Lyons have putting [sic] a lot of focus on the statute starting on April 28, 1994, which is the date that Shell hosted a meeting that made people suspicious enough that they started investigating the claims which developed in this particular – in these particular litigations. However, our belief is that the statute didn't run until sometime in 1995, after counsel had looked into it and decided that there were claims. Certainly no earlier than February 24, 1995.

There is also the issue of the *Crown* case, as to when the tolling – whether it stopped or not when the Court first denied the class action and the Coalition; and then on

June 7, approximately two and a half months later, a renewed motion was filed.

We think that the specifics of all of that say there is no increased risk; but nonetheless, there are different [16] facts, and we acknowledge that there would be different issues. And anytime you have a different issues [sic], you always have a risk of a different outcome. So I can't argue with him, even through as I said, your Honor, we disagree.

Now, what we do propose, though, in order to effectuate his change in the allocation, if that's finally approved by the Court, is to take the final number of 1,187,000, or whatever it is, and just move it out of the named group and put it in the Coalition or the class group. I'm sorry. Just move it over.

And we disagree that this should come out of the attorneys' fees, though you may want to ask Mr. Lyons that. We think it's related to the –

THE COURT: That was my thought, not his.

MR. COGSWELL: Okay. Well, your Honor –

THE COURT: But I wanted to hear whether you or the named plaintiffs, your clients, agree that it should come out of their share.

MR. COGSWELL: Well, the Coalition would not want it to come out of its share, your Honor. The named plaintiffs are not here particularly. I mean we represent them. I do think this presents a bit of a conflict for me. The most I can say is we did our allocation in good faith. It

was accepted by everybody on our side. Mr. Lyons is coming forth and also in good faith tweaking this a little bit. And if the Court [17] agrees –

THE COURT: Maybe you're right. Maybe I should make this decision, if it doesn't throw a monkey wrench into the settlement, because I am convinced that there should be this approximately 1.2 million to the class; and that's got to come out of something.

MR. COGSWELL: Right.

THE COURT: So it seems reasonable for the reasons stated in Mr. Lyons' affidavit that it should come out of the named plaintiffs' share.

MR. COGSWELL: We understand, and I think the Court appreciates the problem that we have on that one.

THE COURT: All right.

MR. COGSWELL: However, to implement that, my point was that once that final number is affirmed and agreed to by Mr. Steve Wilson, our accounting expert, then we would submit a proposed amendment to the plan of administration to accommodate this shift and to make it happen as Mr. Lyons has proposed.

The next, issue, your Honor, is the plaintiffs' motion to establish compensation fund. This motion is presented in two parts; namely, the portion that would treat the class representatives as named plaintiffs and in the process give them a fairly high multiple vs. treating them as class representatives of the classes, where their recovery would be substantially less. And as we had said in our motion, your [18] Honor, these named plaintiffs get the benefit of

the tolling rules, unlike the unnamed parties. And so automatically, they're in a slightly different position vis-a-vis the defenses of the defendants. Their claims are the same, but they have slightly different defenses.

We felt it was unfair that they should be punished by willingness to assume responsibility for the class litigation and give up a higher proportion. However, Mr. Lyons has spoken on this and he's concerned – I think he understands the equity of it, but he's concerned there is no precedent. It is an unusual situation to have a prior class action that generates tolling for named parties in future cases, and so forth.

Your Honor, with respect to this, if that becomes the order of the Court and that that compensation fund is denied, what we would recommend is this: Namely, that the actual net effect to the classes is about $70,000. And since we didn't tell the class representatives that this could happen to them when they agreed to act, the attorneys feel responsible for this. And we would then file a motion and order to the Court later that the attorneys' fees be reduced by this particular number – and this will also have to be finalized and approved by Mr. Lyons – and that our attorneys' fees get reduced but in other respects, for the convenience of the settlement, the class reps be left in the named plaintiff group. And your Honor can leave the class representatives in the named [19] plaintiff group without impacting the class group at all, as long as the attorneys put into the class net distributable fund this amount of money, which I believe will be approximately $70,000.

THE COURT: Okay. You say 70,000 and Mr. Lyons on page 5 of his affidavit estimated 102,057.

MR. COGSWELL: The 102-, your Honor, is a gross amount. If we put 102-, we would then take out another 30- in the attorneys' fees attributable to that portion.

THE COURT: I see.

MR. COGSWELL: So what I'm saying, just to be simple, we'll go through all the calculations. And I'm sure Mr. Lyons will approve it at the end of the day.

THE COURT: I understand. So you're talking about net after attorneys' fees, rather than the gross.

MR. COGSWELL: Exactly. And the attorneys want to be sure that the class reps are not injured by their willingness to be responsible and act as class reps. So we would like the order that the class reps will be treated as named plaintiffs for distribution purposes only, subject to the attorneys' obligation to make the classes whole and not suffer any detriment by reason of this action.

Your Honor, we have also – and this is also referred into the notice – the motion to establish administration fund. There has not been any objections to this, but the [20] administration fund is – we asked for $1,010,785. As the Court, knows this relates to paying – the large part of it is the CO2 Claims administrator. There is another portion going to the CO2 Committee to finance its operations, to do its job on future relief. And the rest of it is estimated out-of-pocket expenses, and so forth.

I should remind the Court that even if this money is set aside, none of it will be spent without further order of court and that we have to come in and apply and obtain the Court's permission to spend these moneys for the

indicated purposes. At this point, though, it's my understanding this motion is unopposed.

Now, the Court has previously approved the motion to approve litigation costs, management fee, and present value of future benefit. I notice the objectors argue that the present value of the future benefit is illusory. And they wrongfully conclude that most of it, 60 percent of it, is based upon the debt which was going to be reduced in any case. If the Court carefully reviews Dr. Hass' report, it will find that that's not the case. But nonetheless, the Court has already ordered and granted these motions. They were all heard by Magistrate Judge Watanabe. Everybody received notice of these hearings. There were no objections filed to his recommendations, and we think that they are at this point beyond objection.

Your Honor, our attorney fee motion and motion for [21] other fees, which is the Coalition 5 percent fee that comes out of the named plaintiffs, remain subject to a couple of issues. One, the actual numbers are not right yet because we haven't settled on the precise settlement fund. We anticipate filing a stipulation with the Court very shortly on this. But I think we would all agree that for purposes of the final hearing subject to the stipulation we're talking about $50.4 million, in that neighborhood.

In addition, your Honor, there is – I understand Mr. Lyons supports our claim for 25 percent attorneys' fees from the classes on a net recovery basis; in other words, after its costs. And there has been no objection to our claim for attorneys' fees on behalf of the named plaintiffs. We have separate agreements with them. However, I should point out to the Court that the Coalition continues unwilling to approve our claim for attorneys' fees. And so

in that respect, this matter will have to be deferred. We've had a dispute with the Coalition; and pursuant to the fee agreement, submitted it to an arbitrator and expect a ruling very soon.

THE COURT: Now, when you say arbitrator, are you talking about Judge Watanabe, or someone outside of the court family?

MR. COGSWELL: We agreed to use Judge Kirschbaum, your Honor, to arbitrate this particular dispute. And he's been busy with other things, though we anticipate within the next [22] several days. And when that happens, we will file something with the Court. In the meantime, I think the Court's approval of the attorney fee motion should be that it is approved subject to a stipulation on final numbers and further subject to the Coalition's approval of the claim against the Coalition members.

THE COURT: Now, let me make sure. I may not even have to do this. Anything you send to the Court should not only be sent to defendant and Mr. Lyons but to the representative of the objectors. And I take it that's Ms. Dubofsky, or –

MR. COGSWELL: They've all received copies of everything.

THE COURT: Okay. Go ahead.

MR. COGSWELL: Yeah. In any case your Honor, your Honor's approval of the attorneys' fees and – could be approved, except the approval regarding the Coalition needs to wait for the – subject to the approval of the Coalition or subsequent hearing to deal with that matter and also needs to be subject to final numbers once

the defendants and the plaintiffs get the final tweaking out.

Your Honor, the next motion we have is motion for approval of plan of administration and distribution. There are two things about this motion I'd like to raise. We would request the Court approve this motion subject to two issues.

[23] The first is the defendants have advised me that they believe the escrow agreement may contain some provisions not consistent with the terms of the settlement agreement. And I've said, Fine, we'll work that out; just let us know what they are. I did look at the settlement agreement when I prepared that; and I thought I'd solved everything, but maybe I overlooked something.

The other – your Honor came out this morning and granted our plaintiffs' amendments to motions, characterized as motions to amend certain motions. One of the amendments had to do with a notice to be mailed out. And as presented, the plan of administration provided for an objection process. And what we've decided is to eliminate that, send the notice out. If people object, we'll deal with it; but we won't invite them to send in objections.

And the other issue, your Honor, on this plan of administration has to do with the filing fee for former owners.

To refresh the Court, the members of classes include former owners, people, whether they were Coalition members, named plaintiffs, or class members, who were in the chain of title and might have claims against the defendants on account of the issues raises in these proceedings.

It provides for mailing them notice of their rights, giving them 30 days to opt out; that is, to decide whether to file a claim or not to file a claim. And then it sets up a [24] procedure for resolving those claims.

We have recommended a $500 filing fee, your Honor, for people who are former owners who wish to initiate the claims process. We've also recommended a $500 filing fee for people who want to defend themselves.

The reason for this is that we don't think that the costs of this former owner proceeding should be borne by other class members and that it should be paid for by the people who are engaged in the proceeding.

Now, the last time I did an AAA arbitration, your Honor, the filing fee was a thousand dollars. We have given the claim arbitrator, who I will discuss in a minute, authority to assess costs in a fair way; so if somebody put up 500 and shouldn't have to, he will be able to get it back.

We've also provided that there would be a sharing agreement, your Honor, so if people really felt they were entitled to something, they should call up the people against whom they're asserting a claim and try to work it out.

We think there won't be many of these claims because a lot of these people don't have large interests and it wouldn't pay for them to – to have a proceeding.

In any case, after the proceeding gets started and efforts are made to work it out, if they can't work it out, it goes to formal arbitration. And in that respect, I have filed a motion for the approval of a claim arbitrator and have [25] recommended Kenneth Barnhill, a retired state court judge who was an oil and gas lawyer. He's familiar with

title issues, and he's agreed to do this for $250 an hour. It is a final binding arbitration, and so it's sort of part of the plan of approval of administration and distribution. And we request the Court grant the motion for the appointment of Mr. Barnhill.

THE COURT: I've known Mr. – Judge Barnhill, Mr. Barnhill, even before he ever was a judge. And he has a very high reputation. And the only thing that surprises me is the low amount of his hourly rate, but I – I have no problem –

MR. COGSWELL: Okay.

THE COURT: – with Mr. Barnhill. And unless someone else has a problem and –

MR. COGSWELL: They can address that.

THE COURT: – or a conflict – To your knowledge, he isn't involved in any of these interests.

MR. COGSWELL: No. He is not.

THE COURT: Okay.

MR. COGSWELL: And he's happy to do this for us. And I've spoken with him, and I think – I can't imagine anybody better, frankly, your Honor, than Judge Barnhill to deal with these particular issues. And I've known him for over 30 years, and he knows his oil and gas law.

Your Honor, in addition we have a motion to [26] establish –

THE COURT: Let me just inquire. Is he sitting as a retired judge on the state court?

MR. COGSWELL: I don't know if he's active or not.

THE COURT: Is that going to be a problem?

MR. COGSWELL: He's doing a lot of arbitration-type work and – sort of like JAG, though he's not with JAG.

THE COURT: But you don't see any problem with his duties to the state court system and taking on this function.

MR. COGSWELL: I didn't inquire; but he certainly did not raise that issue, your Honor.

THE COURT: Okay.

MR. COGSWELL: Another motion we filed is to establish the CO2 Committee, your Honor. This motion is provided for – or this CO2 Committee is provided for the settlement agreement. The CO2 Committee has certain responsibilities in terms of the future relief. The settlement agreement provides for three directors. In reflection, we have decided it should have six directors so that we have continuity. And right now, we don't have all the directors. So we would request the Court approve the establishment of this committee according to the documents attached to the motion upon our submitting to the Court for approval the six directors. We're down to about five, so I don't think it will be long before we get this taken care of.

[27] Now, your Honor, on – The last point I'd like to make – I think I've covered all the motions or the –

THE COURT: Let me just inquire. On some of these motions that you're now talking about, do you want these decided immediately, or are they going to come up at a later time?

MR. COGSWELL: Well, your Honor, the notice said that attorneys' fees and administrative expenses would be part of the hearing. And at the same time, the final judgment attached to the joint motion says the Court has continuing jurisdiction over these. So we don't need all of these orders today, but here's the ones that I think we should have:

I think we should have the order to amend the allocation the way we had proposed subject to the shift that Mr. Lyons proposed.

I think we should have the motion to establish compensation fund approved subject to our proposal to shift from the attorneys' fees over to the classes.

The three motions relating to costs, management fees, and future value have been approved.

I think the attorney fee motion should be approved so there is some expectation out there as to what people are going to receive. And again, that approval should be subject to final numbers and to the approval of the Coalition insofar as it's involved. And part of that motion is also to approve the [28] 5-percent fee to be paid to the Coalition from the named plaintiffs' group.

We would like the motion for approval of plan of administration and distribution approved in principle subject to refinements in the escrow agreement and the amendment previously filed. We'd like the motion for appointment of claim arbitrator approved, the motion to

establish CO2 Committee. I guess, your Honor, there will be some stipulations where there is conditional approvals; but it would put behind us a lot of things, and so we would request that.

I've already gone beyond my 15 minutes, I'm sure; but on the objectors, your Honor, we – objections, we have filed lengthy response to the objections, and we would stand on that, unless the Court would like us to address any particular objections.

I would point out that as a practical matter, the objectors have opinions that are at variance with the opinions of other responsible people as set forth in the court record. And so the conflict between experts that existed before this case was settled on the merits is now existing in connection with the settlement of the fairness of this case.

We don't think that there is any credible evidence that the opinions of the persons that say this is a good settlement – there is no credible evidence against their opinions. And we think the objections should be denied and the [29] settlement should be approved.

THE COURT: Assuming that the settlement is approved, are there any post-settlement motions that we will have to take up?

MR. COGSWELL: Your Honor, there will be approvals on stipulations and pretty routine things. I do think the objectors have made it clear in their recent replies to their objections that they will appeal. And we will be filing a motion regarding the cost bond under Federal Appellate Rule 7 and that we hope to get filed right away. And that could be heard on May 6.

I don't think there would be any material thing, your Honor, after today, apart from approving certain notices and things like this, implementation of the settlement vs. approval of the settlement.

THE COURT: And I think we already have that May 6 hearing set, if I'm not mistaken.

MR. COGSWELL: Say that again, your Honor.

THE COURT: We have the May 6 hearing already set on the docket.

MR. COGSWELL: Yes. I think we should keep that hearing.

THE COURT: Anything else you want to say at this time?

MR. COGSWELL: Your Honor, I think I've covered it [30] quickly and briefly. However, if anything comes up that you would like my views on, I'd be happy to present them.

THE COURT: Okay. We'll see how it goes.

Rather than hearing from three defendants' attorneys, do we have anyone that can speak for everybody?

MR. McCOLLAM: I suspect, your Honor – Drew McCollam. I suspect I speak for everybody until they shout me down, if I may make a statement.

THE COURT: Why don't you go ahead, Mr. McCollam. And if somebody has to say something besides yourself, they'll wave their hand or let me know.

MR. McCOLLAM: Thank you, Your Honor.

THE COURT: Can you keep it fairly brief? And would you also include any views you have on Attorney Fairness Expert Jim Lyons' suggestions.

MR. McCOLLAM: Yes, your Honor, to both questions.

And may it please the Court, Judge, you mentioned six years. And I know we have a forest of paper before you. What I will do is try to be brief, hit what I think are the key points that we would like to amplify from defendants' perspective with the up-front statement and encouragement to the Court that if there are any particular things you'd like me to amplify, please ask me to do that.

THE COURT: You know, I just have to say to you absolutely there has been a forest of papers. This is just a [31] small part of.

It and when I was younger as a judge, I used to sometimes have this idea that where really prolix, unneeded paper was being filed, I should tell the attorneys, you know, You file it, but you're not going to charge your clients for any of it. And I almost have that feeling now, so much has been filed: Why should these clients be charged for the excess? I've gotton older and wiser; but in any case, there has been a forest of material.

MR. McCOLLAM: If you would impose that rule here, I would plead with the Court to not make it retroactive.

THE COURT: I won't do it –

MR. McCOLLAM: Can I move on before we discuss it anymore?

THE COURT: – unless there is some future forest filed before me.

Go ahead, Mr. McCollam.

MR. McCOLLAM: On behalf of the Shell defendants, your Honor, and speaking also on behalf of the defendants' positions on the motions generally, our view is that on the principal motion, which is the motion for final approval and certification, the defendants have obviously joined in and support that motion. We agree that as part of the court's ruling on that motion, the Court should address the plan of allocation and distribution, including the question of the [32] compensation fund.

You have before you plaintiffs' proposal and Mr. Lyons' proposed modifications. And let me speak to that specifically, since you posed the question.

The defendants take no position, your Honor, on the specifics of the allocation. We agreed in the settlement agreement that we would not get into the – inject ourselves into the allocation process. The theory was that that ultimately was the Court's province. Now it's the Court's province with input from the fairness expert. And in light of that, we have not, as you know, other than one page or so, spoken to allocation.

I've read Mr. Lyons' affidavit. I certainly don't disagree with the Court's assessment of it, but that's something we have contractually agreed not to get into.

On the secondary motions, what I would describe as the secondary motions that Mr. Cogswell discussed at length, I think that those are largely matters either of administration and distribution, in which our role is

limited, really just to try to make sure the numbers are right and they've got the data they need, or they're matters concerning allocation.

My thought – and this is somewhat gratuitous, but I do offer it – my thought is that the primary motion for approval and the associated plan – and when I say the plan, Judge, on that what I really mean are what are the basic [33] percentages. The plan, on the same level of detail as it exists in what you've preliminarily approved, needs to be addressed in the judgments and in the findings and conclusions.

When you get to the gory detail of figuring out how do you transform those percentages into whether Ms. Smith gets, you know, a thousand, $222.08, that's this process that is going to be affected by the Lyons modifications, it's going to be affected by finalizing the decimal subscriptions. And those are matters that at least from our perspective would better await the next hearing to finalize.

I understand what Mr. Cogswell is proposing, in essence, is that you would grant those various motions subject to kind of further tweaking and review. And I guess that's okay. My thought would be we might as well tweak it and get the numbers pinned down, but I'll leave my gratuities behind at that point.

Some of the motions, the motion for the administrative funds, CO2 Committee, claims arbitrator, really are completely out of our bailiwick, as is the attorneys' fees.

I will say to the Court – and I want to come back to this – that at this moment, as best we can calculate the 6,000 or so lines of data that you have to go through to figure out where we are, the subscription is .1126, compared to the

.118, which was basically the benchmark. That means that the fund is 50.4 million. And that means that we have a 96-percent [34] subscription.

And most of the opt-outs that are the difference between the 96 and the 100 percent are parties with cases elsewhere, basically people who are already litigating, or what we call contractual opt-outs. There were two members of the Collation [sic] who at the end of the day wanted out, Messrs. – or Mr. Ptasynski, I believe, and then Bridwell Oil. So that's basically what makes up the difference.

With that, I'd like to move to the two basic subjects, Judge, that from the defendants' perspective we would like to focus the Court's attention on. And they are overall adequacy and the certification issue. And taking up overall adequacy, from an overall perspective, is the settlement fair, reasonable, and adequate, we think that's a question that the Court should address first, and we think that's a question that the Court should address independently as a threshold determination.

Of course, the test is expressed in *Gottlieb* and *Jones*. *Gottlieb* is 11 F.3d 1004, and *Jones* is 741 F.2d 322. And I'll focus on the middle factors briefly: the questions of whether or not there are substantial questions of law and fact that put the outcome in doubt and the question of the risk/reward question, are the rewards of immediate recovery such that they balance favorably with the possible ultimate litigated outcome.

[35] We, from the defendants' perspective and from the standpoint of overall adequacy – we believe the Court should consider the full range of possible outcomes, not just a plaintiffs' maximum outcome; frankly, not just a defendants' best case outcome and certainly not the post-allocation net

outcomes that have been encouraged by the objectors with respect to maximum outcomes.

There is a chart, your Honor, and an it's associated with some text that's in the exhibit – it's not actually an exhibit. It's on the back of the Platt affidavit which we submitted as part of our opposition to objectors.

THE COURT: Why don't you put it on the side so people in the visitors section can also see it as well as the Court.

MR. McCOLLAM: This was my best attempt, Judge, to boil down –

THE COURT: You can turn it a lot more so that people can see it.

MR. McCOLLAM: I'll say – if I may, I'll say it's the chart that's attached – I think it's at page 41 of Mr. Platt's affidavit. I have some small versions –

THE COURT: I can see it at an angle, so why don't you put it –

MR. McCOLLAM: How is that?

THE COURT: a little more – okay. I hope most of the people can see it.

[36] Go ahead.

MR. McCOLLAM: Okay. And I should – there is also a text chart that reflects what all of the specifics are that are associated with these lines.

Basically, Judge, what this chart reflects is the proposed settlement amount of $52.8 million. That was to the .118 decimal. All of these damages amounts have been

normalized to the .118 decimal, so that we're talking apples to apples, with the exception, which I'll note in a moment, which are a couple of the Texas claimants' scenarios.

I should also say for the record, in going and getting ready, there is a typo on one of these lines. And I can either – I can read it into the record or submit a corrected version after the fact.

Reference No. 9 should read $30,561,053. I don't think that changes the consequences of all of this, but I wanted to make sure that I corrected that error.

Essentially, Judge, our point is as follows: If you do not look at maximum outcomes for either plaintiff or defendant but you look at rational risked versions of these various claims, trying to articulate the real risk profile presented by trying to assert the claims based on different potential outcomes of the legal and factual issues, what you see is a distribution of damages claims where almost two-thirds of these occurrences fall at or below the settlement amount.

[37] As a for instance, I'll give you one example. Actually, let me give you two, if I may.

If you look at what I regard as the core claims asserted in this case by plaintiffs, which are the unreasonable transportation claim, the contention that the tariff was too high, and if you look at the basic pricing claim, you see numbers in the 70 to $80 million range. And that's 8/8ths all in with interest. That would be No. 28, for example. That is $77 million. It's the unreasonable transportation claim with 8 percent interest unrisked.

To address briefly the *Rogers* issues that you've heard so much about, if you provide any risking these *Rogers* claims, risking, for example, by taking the small share working interest owners out and by taking out a percentage of leases that would be attributed that would have express language for transportation, you get down to numbers like that reflected in Claims Reference No. 32, which is 102 million. And if you risk a *Rogers* claim for some of the other defenses, such as the fact that only part of the volumes from McElmo were involved in a net back calculation and division order coverage, you get down to numbers as low as claims Reference 8, which is 2.7 million.

Now, Judge, I – I'm mindful of the admonishment in the cases that we're not supposed to have a minitrial. I'm also mindful that it really isn't possible or appropriate for me to say I am going to win and convince you of that or for [38] anyone to try to convince you that I'm going to lose a maximum case. We submit that by any rational risk analysis, the amount of the fund is very significant. I was somewhat distressed. I'm afraid I have not made a good impression in Colorado on Mr. Lyons. I hope if we had tried it, I could have made a better impression. He says that the overall value is at or beyond the range of what he would expect in litigation such as this. That came with some degree of chagrin to my client.

On the future – on the future relief aspects, Mr. Cogswell made the point that the future has already been addressed at great length by the magistrate judge. The objectors' experts take issue with some of the calculations. Our experts have responded.

To cut to the heart of that, Judge, on future, the future relief provisions address the very issues in a thoughtful way that were of concern for the last six years to the claimants. They wanted going forward relief that would give them the opportunity to exclude contracts that they felt were not market responsive, didn't reflect accurate pricing. That's in there. They wanted relief from the tariff on a going- forward basis – I'm sorry – basis, and that's in there.

We have a chart that is attached to Mr. Lukens affidavit on the future tariff that reflects that if you compare the tariff on a going-forward basis – this is a [39] snapshot. I believe it's – I believe it's for '02.

THE COURT: I have that.

MR. McCOLLAM: Right. And it reflects that the going-forward tariff for '02 for Cortez Pipeline is equal to or below other major carbon dioxide pipelines out there, and it's a tenth of a cent on an inch – I'm sorry – on an MCF per mile basis higher than the Bravo tariff, which is a deal that was negotiated by objectors' counsel.

I'll also note, though, that that is flat, into the future; and the McElmo settlement tariff falls – or predictably, as Mr. Lukens says, will fall into the future. So whether that's an equal deal to Bravo or better, I'll leave to debate. But our point is that, cutting to the chase and to the heart, the future is clearly sufficient and indeed more than sufficient.

From a handicapping – I'm sorry – from a handicapping perspective, is this adequate? I have to be cautious about talking about it as being fair. My lead witnesses, the business people at Shell, when they heard what I had

done, expressed varying degrees of disgust with me. I'm glad they don't have standing to object. But Shell decided to settle the case, to moderate their risk so that they could get back into – and specifically in the context of Kinder get back into the CO2 business, rather than the litigating business.

And there have been a lot of things said about CO2 [40] Claims. One thing I'll say about that them is that they're an organization that committed themselves, as far as I can tell, solely, exclusively, and certainly tenaciously to be in the CO2 litigating business for the last six years. The amount that we agreed to pay may not from our perspective be exactly fair. It seems like a lot. But it's what was necessary. And I would submit to the Court that it clearly from an overall adequacy standpoint passes muster.

Let me turn briefly – and I do mean briefly, because I'm looking at the clock – to a couple of quick certification issues. I think we've gone through this in the briefs. I'd like to amplify three points very quickly.

First, one of the mantras that's offered about what's wrong with certification here is, Gee, Judge Weinshienk, you denied it twice before, defendants opposed to twice before, what can possibly be happening here? And let me speak to that.

THE COURT: And why don't you follow: And therefore, there has to be some sort of collusion.

MR. McCOLLAM: Right. And I'll say first, your Honor, I don't understand how those two things connect, but perhaps when I explain to you my reaction to the argument, I'd encourage you to pull out of me if you have

some things you want to probe. But first let me say that the three classes here individually and collectively are very different than those that were at issue in CO2 Claims, as I'm sure the Court [41] will recall.

Secondly – and I argued certification standing at this podium twice to your Honor. And I went back and read through those transcripts. And I've argued certification elsewhere in these carbon dioxide cases. And what does that argument over and over, Judge, boil down to? you would ask me questions like – I would be talking about management problems, and it's hundreds of contract cases, Judge, with individual contracts and individual intents, and so forth. And you'd look at me with those – over your glasses with those, you know, peering eyes and you'd say, Well, Mr. McCollam, can't we manage that with subgroups? Can't we manage that by grouping the evidence? Questions of that sort. And I get a lot of those questions when I'm arguing certification in these cases. Can't we manage those things?

And my answer to you then, Judge, and my answer to you now is no, we can't manage them if we're going to try the case as a class action.

But the one thing that *Amchem* – and let me just say this; I'm sure you won't remember. We always imagine that you remember us much better than courts really do, since there are so many of us.

THE COURT: And you also have to remember all the other things I'm dealing with besides this case.

MR. McCOLLAM: Understand. But another thing that I [42] urge you to do, Judge, in the class certain arguments and have urged other judges in the carbon

dioxide cases is look forward to the trial of this case. What's it going look like? What's the charge going to look like? What are all the intricacies from the management of the litigation going to look like?

And the one thing that there is no doubt in the world about is that the *Amchems* of the world – which is 521 U.S. 591. And *Amchem* says this at page 620 of the U.S. version: There is no doubt in the world that management issues are off the table in the context of a class settlement, as opposed to certification for purposes of class trial.

On the adequacy and alleged conflicts, I'm somewhat reluctant to wade too deeply into the lawyer contest; but let me just pose a couple questions: Other than allegations that the small shares on the one hand and the royalties and the overrides on the other hand presents [sic] some conflicts, is the situation of the accuser any different than the situation of the accused? Yes, there is diversity within royalty groups or override groups, and there is also a diversity between royalty and override groups. Remember, Judge, that in – that the royalty owner in many instances creates the override; in many instances creates it in a separate contractual arrangement to which these defendants are strangers. Mr. Platt's affidavit notes that indeed there are examples of that with the intervenor objectors.

[43] And you've also heard a lot here about how no transportation – and *Rogers* is the lead case in Texas. That's not what I hear in Texas. What I hear in Texas is, Well, our lead claim is the contractual claim under the unitization brochure, which, by the way, is bolstered by *Rogers*. Why is that the speech I'm hearing down there? Because of the recognition of all these diversity problems.

I'll also note that those claims are the same ones that were asserted and rejected in the Ptasynski case.

And concerning the idea of small share, on the one hand, vs. royalty and override antagonism in this settlement context, if you look at the overall settlement amount and the negotiation for that amount, obviously the plaintiff group wants the biggest pie possible in the settlement negotiations. And as best I could tell when I would look – I guess I was up a floor at Judge Kirschbaum's offices. There were royalties, overrides, and small shares in the big conference room they were all in. And throughout the – What defendants have experienced from plaintiffs is basically this argument: A rising tide raises all ships. The contention has always been: Look, you know, to the extent the small shares underpaid anybody, you made us do it, and we want the money out of your hide, McCollam. And at the end of the day, that's where it came out of.

Lastly, on *Amchem* and *Ortiz* and the notion that those [44] cases illustrate that the certification that's being requested here is improper, in addition to the fact that in *Amchem* you've got injury only, exposure only, a case that was filed not for litigating purposes; in *Ortiz* you have a limited fund, mandatory class – vast differences from here.

But in a different – in addition to those things, there are structural assurances here. I said early on that there is no agreement in the settlement about allocation. There is no agreement in the settlement about allocation – the plaintiffs – or actually, it's the objectors – snipe at us that we haven't weighed in on the allocation thing. We agreed not to agree about allocation in the settlement. And when I looked at myself in the mirror and said, Is that a wise

idea, what I said is, Well, that's the Court's province. How can I – you know, how can I be upset about that?

So allocation is the Court's province. And what we've seen develop is that the Court has involved a fairness expert to assist it, in addition to the magistrate judge's work, and so forth, on those questions.

In summary, your Honor – and let me – let me try to crystallize my thoughts in summary this way. The first objections that were ever filed to this settlement were filed on August 30. There was no settlement agreement on August 30. The defendants were just starting to embark upon many day-long, face-to-face negotiations sessions here in Denver with the [45] plaintiffs, trying to hash out the final, definitive agreement.

When those first objections – And that didn't occur, we didn't finalize it, until September 24. When those objections were filed on 8-30, August 30, the objectors had no knowledge – and they admitted in their objection they had no knowledge about what the terms of the settlement was or the settlement in principle, I guess at that point. They promise in a footnote words to the effect of: However, we have no doubt that once we figure out what the settlement is, we'll find a number of reasons why it's unfair.

The objectors didn't need to know anything about the settlement to object to it. No settlement in Colorado will ever be acceptable.

Contrast that, your Honor, to the judgment of potential class members. Class members that received detailed information in notices about allocation specifics, about *Rogers,* about other cases. Contrast that to them.

There are 25 listed opt-outs, named people. 12 have existing claims in Texas. People like Mr. Ptasynski, whose case was just decided in the Fifth Circuit; people like the Bridwell Oil Company, whose case has been decided on a number of summary judgment aspects.

THE COURT: You say 25. I somehow counted 23.

MR. McCOLLAN: I'm counting the contractual opt-outs as well, Judge. One of the things about these papers that have [46] been put before you – and I've talked with Mr. Cogswell about it – is it seems to me we've got to get the list of all the names before the Court just so we are completely forthcoming, even though there are some of them that may not have a decimal impact.

THE COURT: So continue. Assume there is 25, what are you saying?

MR. McCOLLAM: What I'm saying is 12 have existing claims in Texas, so they're plaintiffs in other cases. Five have existing cases in Colorado. So they're pending plaintiffs in Colorado cases. And those – that's Mr. and Mrs. Grynberg and their family. And then five are oil and gas companies, people like Ocean Energy. I think one of them is UMC. So out of the 25 listed, there are three that aren't either plaintiffs in other cases or oil companies.

And frankly, Judge, the opt-outs of some – those three are somewhat equivocal. There is a minister, I think, from somewhere in Florida who says: I don't think I own this; I tried to give it away. This is an under statement: I have no love lost for Shell Oil Company, but I want no part of this.

So bottom line is what you see, Judge, is with all this information, a very small, minuscule opt-out rate that isn't basically people that are plaintiffs in Texas cases or oil companies. [47] As I say, there are many, many issues that have been put on the table.

THE COURT: Let me ask you a couple questions before you stop. The objectors have made proffers and arguments concerning collusion, and you've already addressed that to some degree. But is there anything else that you want to put on the record regarding allegations of collusion between the plaintiff and defendants?

MR. McCOLLAM: Let me speak. I don't want to argue. I'm reluctant to argue that, so let me speak factually –

THE COURT: If you don't want to say anything, you don't have to.

MR. McCOLLAM: When I say I'm reluctant to argue, it's beyond comprehension to me, Judge. I don't want to dignify it with an argument, honestly. Let me tell you factually what occurred, Judge; and then maybe I'll get over my reluctance to get vitriolic about it. I hope I don't get over it.

You know, Judge, we started mediating – we started negotiating off and on with plaintiffs in these cases back – I can't remember how far back, but in 2000 or earlier. We had a two-day mediation session with Justice Kirschbaum, as I recall, in January of '01. And we go in there, and they go into their room and we go into ours, and my client is very upset with me about what they want, and it's way past any conceivable authority level I've been able to cajole

my clients into. And [48] we go home. And we have several additional face-to-face negotiations that are very hard-nosed, tough trading sessions. We had one, as I recall, where I flew up here in May with my clients and sat in the room with them.

We then had phone discussions; and we come back in August, on the eve of trial, in essence, and have another session with Justice Kirschbaum. And that mediation stretched out over three days. We were with Justice Kirschbaum for two days. And then on the third day, we were trying to come to closure with him on the phone and us meeting about where we were.

After that, where I thought we had gotten to agreement in principle in essence, it then took us seven or eight weeks to negotiate a final agreement, until September 24, and there must have been – I mean, I don't have it on the top of my head, but there had to have been five or six days where we were in face-to-face meetings, trading all day long, and many phone conferences that lasted two, three, four, five, six hours.

And I don't – I don't get it. I mean to me, the collusion basically, as best I can tell – the collusion, to the extent it has any substance – and I don't want to suggest that it has any. It's based on this structural argument, this reverse argument auction thing. And to me, that's a structural – Here in essence to me is what objectors are saying with that. They're saying: Look, every time a class [49] action is filed, anywhere on the surface of the earth, somebody can come along and file a copycat class action and make a demand for the moon. And thereafter, the first action is unsettleable, because they basically say, Well, you cut a sweetheart deal, you reverse-auctioned. And what it really

means is if you file a copycat class action, all of the cases become unsettleable. You could never settle another class action. Presumably, if the Texas plaintiffs settled, then Mr. Cogswell shows up and says you did a reverse auction.

It's also factually incorrect. What was being dealt with in the two cases was different, but I really – I really don't –

THE COURT: If you know, and if you care to tell me, of your knowledge, did Justice Kirschbaum know about the Texas cases at the time that he was dealing with you folks?

MR. McCOLLAM: I saw that proffered question. Let me say that first.

The second thing I will say is that Mr. Williams has been trying to teach me in the last three or four weeks about the sanctity of the mediation process in Colorado. And let me say this – and I think I can say this: I don't think – I mean, Mr. Williams, tell me if I'm wrong – I don't think it would be improper for me to say I honestly don't recall off the top of my head whether he did or not. I just don't remember. I mean, there is a way I could find out, probably by going and [50] looking at notes and stuff; but I honestly don't recall off the top of my head.

MR. COGSWELL: Your Honor, for what it's worth, I can sure add in that he learned about it when he was in our room.

THE COURT: He learned about it when he was talking to your side.

MR. COGSWELL: Judge Kirschbaum knew about the Texas cases.

THE COURT: Okay. One other question, Mr. McCollam – and I don't know if you can answer this, or if we're going to need maybe Mr. Sullivan or Mr. Barber. There has been questions raised in the proffers about Cortez having decided to retire its debt by using a portion of the cash flow before any settlement was reached and the question whether that has anything to do with the settlement or whether that part of the settlement has any settlement value.

Do you want to make any comment there, or shall we get someone from Cortez?

MR. McCOLLAM: I can comment from the perspective of the producer defendants, or at least the Shell producer defendant. And Mr. Sullivan may want to follow on with me.

As I appreciate, the objectors and the objectors' experts' sort of indictment of the future relief portion, which Judge Watanabe has already addressed and ruled on, it basically boils down to Look, this consent decree is – was very bad and [51] very evil; and look, they've adopted it going forward; and these aspects of the settlement that are supposed to provide tariff relief are of no – I guess the word is "illusory" benefit.

And what I would say from the producers' perspective is this: And Mr. Lukens – Dr. Lukens, I guess an economist and a pipeline rate guy, addresses it in the affidavit we submitted with our response to the objectors' objections. What Dr. Lukens says is he says, Look, the case shouldn't be about whether the consent decree is good, bad, or indifferent. It should be about what the Cortez tariff actually was when it came out of the door, and what

it was was reasonable. It generated a 13 percent rate of return.

Moreover, to the extent that there is an indictment of the consent decree applied historically, that's really off the mark if you're looking at it on a going-forward basis, because the two big things that people, detractors of the consent decree – and all rate methodologies get detractors. But the two things that the detractors point to is the valuation rate base is high or arguably high; and what's called this double recovery of interest – it's really not double recovery. You get interest as an expense and you get 7 percent return on it. And what Dr. Lukens says is: Look, on a going forward basis, the rate base has been depreciated, so, you know, a 19-year-old consent decree, which is what it is going forward, is not what [52] it was originally. And then secondly, the interest has already been retired to some extent.

It's my understanding that – and now I'm speaking, treading on Mr. Sullivan; but it's my understanding that there is – sure, there has been an ongoing plan to reduce debt over the last number of years. But the plan, with the specifics of a third of free cash flow reduction, which is what's in the settlement agreement, is a commitment to these third parties, and it has very real positive aspects.

And then the last point I would make is everybody always seems to just kind [sic] rush by the other going-forward relief aspects, which is this annual review process that's provided for of how the tariff gets calculated with information being provided to the plaintiffs and what we call the net back enhancements, the sliding scale enhancement based on throughput, and then the 20 percent royalty floor.

I guess that would be my reaction from the producers' standpoint.

THE COURT: We've been going quite a bit of time, and I'd like to take a 10-minute recess and get back to a few more people presenting statements. Let me just say that I'd like – First of all, I'd like to finish this up by lunch. We may or may not be able to. But I do want to hear if Mr. Sullivan or Mr. Barber want to say anything. And let's do that right after the break. And also after the break, I want to give Mr. Lyons [53] a chance to comment on any thoughts he's had since his affidavit and the suggestions therein and anything he wants to tell us concerning what he's heard.

I would simply say to the objectors that I have really considered the proffers and have, as you know, asked a few questions. At this point, I don't think there is any reason to hear from any of the objectors' attorneys or to hear any testimony from any of the various people they want to call. But we'll see how that goes. I could possibly give Ms. Dufobsky five or ten minutes. We'll see if that's really necessary.

Let's take a 10-minute recess.

(Recess at 10:35 a.m.)

(Reconvened at 10:47 a.m.)

THE COURT: Anything further before you sit down, Mr. McCollam?

MR. McCOLLAM: I'd like to utter two more sentences, including that one.

We have not submitted a bunch of additional exhibits in connection with the hearing *per se*. All of the exhibits that we'd like the Court to look at are in the record, and I'd simply like to ask that the Court take judicial notice of the Court's file. To the extent you would like a more precise reference of exactly which motions and which exhibits, we could provide that.

[54] Thank you.

THE COURT: Well, if things are files, I really don't have to take judicial notice. They're part of the file. But it's physically, I think, impossible for me to commit to memory every paper and every line that's been filed in this case. My memory needs to be refreshed if there is something specific you're trying to remind me of.

MR. McCOLLAM: My understanding, based on the Court's opening remarks, is that you were taking into account the file and your experience with the case for six years. All I'm saying is the exhibits I referenced here today, we're not submitting those additionally. They're in the pleadings that we've submitted; and we rest on and we rely on that record.

Thank you, your Honor.

THE COURT: Thank you.

Okay. Do we want to hear from someone else for Cortez?

MR. RATLIFF: Your Honor, before Cortez, could Shannon Ratliff on behalf of Mobil – I want to answer for Mobil one question on behalf of myself –

THE COURT: Sure, go ahead.

MR. RATLIFF: – Mr. Williams, Mr. Youle, and Mr. Eberle.

THE COURT: Mr. Ratliff, why don't you take the microphone so we can have a little better record.

[55] *MR. RATLIFF:* I simply will state on behalf of the lawyers for Mobil there has been no collusion, no conspiracy, nothing other than hard negotiation to try to arrive at a settlement. But I wanted that on the record.

THE COURT: I appreciate that. Thank you.

Okay. Let's go ahead with Mr. –

MR. SULLIVAN: Sullivan.

THE COURT: My memory, Mr. Sullivan. Go ahead.

MR. SULLIVAN: Your Honor, Kent Sullivan speaking on behalf of Cortez Pipeline Company.

I'm pleased to address some questions that the Court has raised today and also in the past, particularly with regards to the participation by Cortez Pipeline Company in this settlement.

I think it's important that in assessing the participation, you first understand the context in which Cortez was a party to the litigation. Keep if [sic] mind, first of all, that Cortez is an unregulated pipeline. The two potential regulating agencies specifically declined regulatory authority over Cortez clear back before the pipeline was built. So throughout the period of its operation, Cortez has been unregulated.

In the lawsuit, your Honor, it's important – or in the lawsuits, I should say, here in Colorado, it's important to appreciate that by motion, the theories against Cortez were [56] narrowed to only th [sic] antitrust claims. We had no fiduciary duty owed to these claimants. With [sic] he had no royalty obligation. The *Rogers* opinion, whatever it may say, was inapplicable to the Cortez Pipeline Company.

It's important that in the Ptasynski case that's been much discussed pending in Texas, Cortez was dismissed. In the other Texas class suits, one referenced as the Shore matter, the Court specifically determined not to include Cortez Pipeline Company in the class suit that was certified. And in the Ragland case, counsel for the plaintiffs ultimately elected not to request that Cortez be included amongst the defendants that class certification was sought against.

We believe, your Honor, that as to the antitrust theory that remained against Cortez, there were very strong defenses and specifically standing, particularly as to the royalty interest owners and the overriding royalty interest owners.

We felt exhibits subsequently to Court showed plaintiffs also shared concern as to whether they had a viable theory on the antitrust claim against Cortez Pipeline.

With that background, your Honor, I'm more than happy to discuss the participation by Cortez in the settlement agreement.

THE COURT: And briefly, please.

MR. SULLIVAN: Very, very briefly, your Honor.

[57] Cortez agreed to make, subject to this agreement, even with the background that I've given to you, its tariff approach. Specifically, not only did we agree that we would maintain the same methodology, which, over the 18-year period that this pipeline has operated, was not shifting to generate lower tariffs. It's a front-loaded methodology. With the passage of time, the tariff tends to trend down because of the manner in which the methodology works. We agreed that we would continue that methodology.

More importantly, your Honor, one of the sincere, serious objections to the methodology has always been how to set the valuation of the pipeline. That was set forth in considerable detail in the settlement agreement, and so that is defined as exactly how we're going to set the valuation. It provides for limitations on the partnership distributions, and then finally it provides for debt reduction.

One of the things that I think is a red herring here, your Honor, is the idea of when we started to reduce the debt. If you think about the methodology and how it works, it permits a 7 percent distribution based on the valuation of the pipeline. One of the objections was that the valuation permitted the accumulation of debt and a return of 7 percent on that debt, plus it also permitted the deduction of that debt as an operating expense.

As the pipeline moves through its useful, life – and [58] in this instance, particularly as it's tied to the life of the Permian Basin, keep in mind we're transporting one product, and that's CO2, from Colorado to Texas. The only demand for that CO2 is tied to the Permian Basin. That is an old oil field. And the majors have already moved out of

that oil field. The value and the longevity of this pipeline is tied to the production prospects of the Permian Basin. So as you move through the life of this project, you necessarily need to be reducing your debt, because as the valuation of the pipeline is reduced, the 7 percent applied against a reduced valuation generates less cash distributable to the partnership. You necessarily need to be reducing your debt during this time frame.

Cortez has been reducing its debt, continues to reduce its debt. And as the valuation of the pipeline continues to contract, it will necessarily need to be reducing its debt, or it will be left with debt at the end of the day for which there is no cash flow to satisfy that debt. So yes, we have a program that we are reducing our debt.

What we did here, your Honor, the concessions that we have made is to make our business plan a part of this agreement with third parties that frankly we felt we had a very good chance of nonsuiting in this case. But we have committed that we're going to make that business plan subject to this settlement agreement.

[59] We've also, your Honor, agreed to make the process by which the tariff is set transparent. In other words, we are agreeing on an annual basis to provide to these claimants detailed information as provided by the settlement agreement as to exactly what numbers we're using to set our tariff. There will also be a watchdog committee that will be funded, the six individuals that Mr. Cogswell spoke of that will be in place to oversee the manner in which Cortez administers the provisions of this settlement agreement.

And then finally, your Honor, we've agreed to an arbitration provision whereby any disagreement between

the royalty owners and Cortez with regards to how this is set is subject to arbitration. And that's an effective, efficient methodology that we didn't have to submit ourselves to, your Honor.

So we feel like that taken in the total context, particularly as to the status of Cortez enjoyed on the eve of trial and the concessions that we made as part of this settlement, including the commitment that we will continue to apply one-third of our free cash to the reduction of debt, which inures to the benefit of the claimants – will be incorporated into this agreement. So we feel that any suggestion that Cortez isn't a meaningful participant just simply misunderstands the mechanics of the agreement and the manner in which the methodology applies.

[60] *THE COURT:* What about the language in your plan about changing this or getting out of it due to a, quote, "change in business conditions"?

MR. SULLIVAN: Yes, your Honor, there is that provision. And we believe that's an objective criteria that can be reviewed. It is not a matter of a whim. It provides – when you think about the product, the single product that we're shipping through this pipeline, it is for the enhanced recovery of oil. Oil is notorious for the volatility of the pricing. There is an issue as to the long-term demand. We necessarily have included business discretion to alter the plan based on the reality of the market in which we operate. We're not free to just simply on a whim say, This year, we don't think we'll go by the agreement.

THE COURT: When you say it's objective, can you just give me an idea of how this would operate –

MR. SULLIVAN: In the event there is no free cash flow because the demand for CO2 dries up and we don't have throughput, we may be in a situation to apply whatever cash we have to some other expense item. But it's an objective criteria that can be reviewed. It's something that the claimants, the plaintiffs, in this instance, can monitor. And to the extent we deviate from the plan that we have committed to in this agreement, we're subject to being answerable to – through arbitration or otherwise for having violated that [61] criteria.

So it's an objective criteria that I think has substance that can be policed. And we certainly understand that as we have made this commitment, we have an obligation to in good faith perform.

THE COURT: And what you're saying is if there is some disagreement whether there is an objective change, that will go to arbitration.

MR SULLIVAN: It's provided for in arbitration, yes.

THE COURT: Anything else?

MR. SULLIVAN: No, your Honor.

I appreciate the opportunity. I guess I feel like it's beginning to sound like we doth protest too much; but to the extent that it is expected that there be some denial of participation and collusive conduct, I categorically deny that on behalf of my client, Mr. Barber, and myself. And beyond that, I don't believe it deserves comment.

Thank you.

THE COURT: Thank you.

I would like to hear from Mr. Lyons, if you want to go to [sic] up to the microphone, if you want to amplify anything you've said in your affidavit. Some of the figures apparently have already been changed since the time you filed it. And if you want to respond to anything that you've heard in court or – let me just ask, Mr. Lyons: I'm assuming you received the [62] objections and the questions – well, the proffers that the objectors put in writing.

MR. LYONS: I did, your Honor.

THE COURT: Okay.

MR. LYONS: And I had a chance to review those.

THE COURT: Thank you. And I'd like to hear whatever you want to respond to those.

MR. LYONS: All right, your Honor. Thank you.

Let me – excuse me – amplify or highlight a few items and then I'd be happy to answer any questions you may have.

First of all, I do suggest and recommend that the Court make two changes, as you've already noted. One is to shift money from the named plaintiffs to the classes. And I do think it's appropriate to come from the named plaintiffs, because they are the beneficiaries of having the classes in this global settlement. They are in similar jeopardy, perhaps quantitatively slightly less jeopardy, to a statute of limitations argument than the classes.

But clearly, having classes involved as a *sine qua non*, if you will, for a global settlement benefits the named

plaintiffs. And it was for that reason, I thought, that two things should happen. (1) The classes should be rewarded fro that by getting some additional money, and (2) the money for that should come from the named plaintiffs.

[63] Secondly, with regard to the compensation fund, I do not believe that the classes should participate in that at all. There was proposed some $487,000 initially that would be transferred from the Coalition, from the named plaintiffs, and from the classes to the class representatives to compensate them as is if they had been named plaintiffs. Insofar as the Coalition and the named plaintiffs choose to do that, that's a matter of private agreement between and among them. But as far as having the class do, it I found very little – that is to say no precedent – for that and therefore felt that that might be well beyond the scope of your discretion, which clearly you have, to provide payment or to recognize services provided by class representatives.

In that regard, I thought the 18,550,000 – $18,550 was adequate.

I also understand what Mr. Cogswell is proposing: that the adjustment be done on a net basis after attorneys' fees and costs. I'd like the opportunity to verify his calculation; but conceptually, I have no difficulty with that. It has the same effect to the class, meaning they are not participating in this additional compensation for their class representatives beyond the $18,550.

Excuse me, your Honor.

As regards the merits of the settlements, let me just say a couple of things. I think that Mr. McCollam's [64] description of the opt-out situation is significant. Whether

it's 23 or 25 individuals who have opted out, he's correct, in my view, that that's a minuscule number of opt-outs. It is important, I think, to remember that the persons who have brought these cases are by and large sophisticated and experienced royalty owners, overriding royalty owners and small working interest owners, who have had years of experience and histories of a long history of dealing not only with these defendants but with the McElmo Dome.

I think frankly they're probably in the best position of all to decide whether this is a good agreement or a bad agreement. And under Rule 23(b)(3), they clearly have the right to vote with their feet. Very few of them have done that. That demonstrates to me that there is overwhelming support for this settlements [sic].

Secondly, with regard to the Ptasynski case, it is true, as the objectors point out – I apologize, your Honor.

THE COURT: Why don't – maybe someone could hand you a glass of water.

MR. LYONS: Glass of water might be helpful. Thank you.

The objectors point out that the *Ptasynski* case is a Fifth Circuit opinion not selected for official publication. And that's true. But nevertheless, it is instructive authority and precedent to the Court here in having some appreciation for [65] what the negligent misrepresentation claims would look like if they actually went to trial and were appealed.

The Fifth Circuit basically determined that insofar as there are negligent misrepresentation claims concerning transportation costs, there is no claim. There has been

none of the elements – thank you – necessary to establish negligent misrepresentation.

What that means in the context of this case in my mind is that this case, had it not been settled, gets appreciably better for the defendants and gets significantly worse for the plaintiffs.

With regard to the *Rogers* claim, your Honor, that's been discussed both in my affidavit and here this morning; but I did want to make a couple of points that I think bear emphasis. First, there is some question as to whether or not my view of the Rogers claims is at odds with your decision on summary judgment in this case, relying on the *Garman* opinion. I read that opinion again and your ruling on it and understood the Court to have determined that division orders and transfer orders simply cannot be used to vary the terms of unequivocal leases.

In my view, division orders and transportation orders, however, are some evidence of intent between the parties to the extent they discuss transportation costs and that therefore, if a court, in construing a contract using generally accepted [66] principles of construction and interpretation, looked to division orders and transportation orders, it would be certainly admissible and competent evidence as to whether or not the parties intended or didn't intend to deal with transportation.

So I don't find that at least my view of the *Rogers* claims are at odds with your summary judgment in this case.

It also appears to me that the *Rogers* issue, for whatever it was worth, was raised by the parties frankly at your instance. You held a hearing on July 27, year before

last, about three weeks after *Rogers* was announced and specifically asked on the record both sides what they thought *Rogers* would do to their cases. Shortly thereafter is when they commenced settlement discussions. And I have confirmed with counsel for both sides that, to put it in the vernacular, the *Rogers* issue was very much in play during the settlement discussions.

There is some question raised about legislation, Senate Bill 141 in the Colorado General Assembly. At the time I filed my affidavit preliminarily in November, the bill had yet to have been considered on its merits by either of the two houses. As of now, it has been considered by the House. It's been significantly amended and basically, as the objectors say, does require and call for the formation of a task force to consider the issue and then report back with the need or the [67] absence of need for further legislation.

But as Paul Harvey says, that's not the rest of the story. There is still the Senate to be heard from. And as of this morning, the matter is pending in the Senate on the calendar. The Senate, as you know, has available to it a number of options. And frankly, in my mind, what happens in the substance of the bill is somewhat beside the point.

I think the point is that there is legislation at all. The fact that the Colorado General Assembly is considering this issue adds to the uncertainty that already exists in any settlements, particularly a settlement like this one.

There are risks of litigation which we tried to set forth in my affidavit at page 18 – excuse me – paragraph 18, pages 12 through 13. There are risks associated with changing economic circumstances. As Mr. Sullivan just

indicated, for example, the volatility in the price of oil. And there is always risk in any settlement, which is one of the reasons parties settle cases: to bring certainty, as Mr. McCollam pointed out, to what is otherwise a very uncertain result.

Your Honor, I don't know if you have any questions for me; but let me just close by saying in February, when we had our status conference, you asked me if I would tell you plainly whether I thought this settlement was unfair or unreasonable. And I told you that I would.

You appointed me as the fairness expert in this case, [68] and I'm also an officer of the Court. And I take both those duties very seriously.

We spent close to 500 hours since we were engaged in this case trying to review it and understand it. And I fully appreciate that's that's [sic] not nearly the amount of time that you've spent or the parties have spent. But based on my analysis and based on my experience in these types of cases over the last 25 years, I think you have a fair and reasonable settlement before you.

And I'd be happy to answer any questions you may have.

THE COURT: Well, no settlement is perfect.

MR. LYONS: Agreed.

THE COURT: I think I'm not asking you or anyone else if this is a perfect settlement. It's like trials. No trial is perfect. What we try to achieve is a fair trial. What we try to achieve in the way of settlements are fair settlements. And there certainly have been problems pointed out by the objectors, but the questions are whether

any of these problems rise to the level of making this settlement unfair. And you've told me, bottom line, that isn't the case. And that's the impression I have from everything that Judge Watanabe has decided and helped me with, is that what we have is a fair situation here in settlement.

So I appreciate very much, Mr. Lyons, more than I can express, having someone like yourself review this. And I'm [69] especially pleased that you have picked out some areas that you think should be modified and let me know about those. And I agree with your analysis on those two areas.

If there is anything else that you want to comment on, anything that was raised by the objectors which would be helpful to them on appeal, if you were to discuss it, or anything that needs discussion.

The important thing – one import thing; there are several import things – but one important thing for purposes of appeal is for the Tenth Circuit to know that I've gone over all these proffers, all these exhibits, considered them, asked the questions that I thought need to be asked. The case law, as I see it, is not quite as Ms. Dubofsky argued at the last time we were here that there is law that says there has to be testimony. There doesn't. What the law says is the Court has to consider all aspects of the objections. And I think probably I have that. But if there is anything further that you want to put on the record, I'd very much like you to go ahead and feel free to do so.

MR. LYONS: I don't believe that's necessary, your Honor.

THE COURT: Hold on just one moment.

Let me restate my question to you. Is there anything in the proffers or proposed questions that you would like to put – answer on the record?

[70] *MR. LYONS:* Well, your Honor, I think most of the substantive matters raised in the proffers, the objections, the proposed questions, have already been addressed either in my affidavits or here this morning.

THE COURT: And I would hope that perhaps some of the modifications that you have thoughtfully suggested in your affidavit and which I intend to adopt will convince the objectors that you indeed are a fairness expert and you're not just in the pocket of the plaintiffs. They are – have raised some issues about whether you're truly a fairness expert and about whether you have enough experience to be such. And I don't have any problems there; but if there is anything you want to say about those areas, I'm happy to have you make a very short record.

MR. LYONS: Your Honor, if you're concerned about it, then I'm concerned about it. If the objectors are concerned about it, I'm not concerned about it.

THE COURT: Okay. Thank you.

MR. LYONS: Thank you.

THE COURT: Well, let me indicate that have I considered the proffers from the objectors, I have considered the questions they wanted me to ask people. It seems to me that the objections should be overruled. I don't really have problems in the areas, 10 or 12 areas raised by the objectors concerning unfairness, collusion, conflict of interest, the [71] *Rogers* problem, the allocation problems, reverse auction, class notice problems, the '41 consent decree problems. I

looked at all of those, and I really don't have any real concerns that anything raised by the objectors make this settlement fundamentally unfair.

However, we do have in the visitors section another highly respected Colorado attorney; and I would prefer to hear for a few minutes from Ms. Dubofsky rather than from Mr. Cruciani, if I can be totally honest. And if you feel that you'd like five or ten minutes, Ms. Dubofsky, I'll give it to you right now.

And I'll try to be honest with you. I've really looked at all this material, and I don't see any problems with approving a settlement. So with that preface, why don't you tell me very briefly what you think I need to hear.

MS. DUBOFSKY: Thank you, your Honor.

In accord with the Court's instructions, I don't intend to argue anything about the proffers. There are a couple of other issues, your Honor, that I would like to call to the Court's attention.

At the beginning of the hearing this morning, the Court denied our motion for supplemental exhibits in support of the proffer. One –

THE COURT: The items that you filed after 9:00 this morning.

[72] *MS. DUBOFSKY:* Yes. Well, also the plaintiffs filed Volume 3 of their exhibits. At least they handed it to us this morning. I don't understand precisely when they filed it, but let me –

THE COURT: To be very honest, I really haven't looked carefully at that, either. I think it was filed last week. Was it?

Okay. Go ahead.

MS. DUBOFSKY: All right. A couple of points I would like to make and ask the Court basically to reconsider the ruling.

First of all, we received the fairness experts' report – it was hand-delivered on the afternoon of April 2; but it was at a time that Mr. Neuwirth was not in his office, and that's to whom it was delivered. So consequently, we did not have that report until in effect midmorning on April 3. And we reviewed it and filed pleadings as fast as we possibly can.

When the Court looks at the motion that was filed at 9:01 this morning, it will see our reasons for filing simply some supplemental exhibits. There is no argument. Nothing. But one of those exhibits is a division order. It's Exhibit No. 70 – I'm sorry – 70. That's correct. This particular one is from Mobil Oil Corporation. And the reason I mention it is that it refers to something that Mr. Lyons just mentioned. [73] And it says, "This agreement does not amend any lease or operating agreement between the interested owners or lessee or operator or any other contracts for the purchase or sale of gas."

I guess if that doesn't amend the leases, then it's a little difficult to see how it can be taken into account as extrinsic evidence. And the reason we're bringing this up again for the Court's consideration is that we think that's an exhibit or proffered exhibit that would be useful to the Court.

I only want to mention one other matter with respect to filing things, and that is this morning we also filed objections to the proposed attorneys' fees. Now, today we're probably filing these early; but the expert witness – I'm sorry – the fairness expert's report –

THE COURT: Okay. I've just been handed some papers filed this morning at 9:19.

MS. DUBOFSKY: That's correct, your Honor. And you don't have to deal with them today. We just did not want them denied out of hand. The reason we filed them today was because the fairness expert's report considered attorneys' fees. But then we heard Mr. Coughlin [*sic*] at about the time we were filing this say, "Oh, no, we don't want this considered today." And we were simply trying to protect ourselves by filing them. There is no reason, I believe, that this filing should be not received by the Court.

[74] And we apologize for all the papers. Unfortunately, because of the four cases, we think you get four copies of everything, and that increases the paper by a lot more than I think any of us would wish that did t [sic] did.

I would like to turn then very briefly to the proposed findings that Mr. Coughlin's submitted. He submitted them to the Court last week and argued today that the Court did not need to enter these proposed findings if it signs the judgment but that it would need to make findings of fact in due course.

THE COURT: Just so – I'm not sure who you're talking about. Mr. Coughlin?

MS. DUBOFSKY: Yes. The plaintiff's proposed findings of fact.

THE COURT: Are you talking about Mr. Cogswell?

MS. DUBOFSKY: Cogswell. I have Coughlin on the mind. Judge Coughlin, as you know, was the judge in a recent case I've had. And I'm sorry. I keep writing down "Coughlin." I mean "Cogswell."

THE COURT: Okay.

MS. DUBOFSKY: This was submitted by Mr. Cogswell. My apologies.

Paragraph 118 and 145, I'd specifically like to direct the Court's attention. Page 51, paragraph 118, the last sentence says that "the objectors are motivated by a desire to scuttle this settlement in order to preserve their class [75] actions and their attendant attorney fees in Texas and not by legitimate concerns about the fairness of the settlement."

This theme is picked up again in paragraph 145, where Mr. Cogswell says that "Mr. Cruciani has abused the litigation process by using the objectors to pursue his personal agenda with the purpose of attempting to spoil a settlement."

And the footnote there quotes response to a question that I gave to one of the court Court's answers and says that "This cautious, indirect response is tantamount to an admission of ulterior motives."

Mr. Cogswell is asking the Court to make findings of fact that the objectors' attorneys have had ulterior motives in making the objections in this court, in proffering objections, which we understand we have a perfectly legitimate right to do.

This position he has taken apparently is on the basis that the only interest the objectors have in this litigation is in Mr. Cruciani's attorney fee in Texas, which is a contingency fee in the named plaintiffs' claims in Texas. As the Court knows, the class fees are determined within the discretion of the Court. And, of course, Mr. Cogswell has a substantial attorneys' fee at stake here.

We want to make it very clear that we have an obligation to clients in Texas to make the objections that we have made in this case, because the *Rogers* no-transportation claims in those cases have been preserved all along. They've [76] been the subject of class certification. They're scheduled to go to trial. And we have an obligation to inform the Court of those claims and the ways in which those claims may or may not be impacted by this settlement and to have the Court understand what the world of this settlement encompasses.

So therefore, we ask that the Court not include in its proposed findings of fact anything from paragraph 118 or 145 as proposed by Mr. Cogswell.

THE COURT: I don't think it's possible for the Court to make findings of ulterior motives.

MS. DUBOFSKY: I hope not, your Honor. We just wanted to make it clear that the Court understood some of the things that were in those proposals and perhaps take into account that other matters that have been presented to the Court have been presented in a way that was not – well, perhaps was overstated. Let's me leave it at that.

And finally, we appreciate that the Court is asking some of our proffered questions. Mr. McCollam and Mr.

Sullivan in effect testified in response to the Court's questions; and we think that their responses affirm our request for discovery, testimony, and cross-examination about the terms of this settlement.

And last, although the Court prefers to hear from me, I have to tell you that Mr. Cruciani is one of the finest attorneys I've ever worked with; and I just can't let some of [77] these things stay on the record.

THE COURT: That's good to hear, because I, too, was concerned that maybe one primary motive, if not the motive, is attorneys' fees; and that is disturbing, if that's true.

MS. DUBOFSKY: Well, whenever you have competing litigation with contingent fees on both sides, of course attorneys' fees is an issue.

THE COURT: That's what you told me last time.

MS. DUBOFSKY: That's right. But there are clients with very real interests whose cases are being brought only because a contingency fee is available. And Mr. Cruciani should not be subject to any more disparagements because of that contingency fee than the plaintiffs here should be subject to disparagement. And I have to object on the record when people imply that somehow or other Mr. Cruciani is operating with ulterior motives or not providing good legal work.

THE COURT: I understand what you're saying.

MS. DUBOFSKY: All right. Most of the legal work presented on behalf of the objectors in this case has been done by Mr. Cruciani and his firm, McKool Smith,

which are very fine lawyers in Texas. And we simply have to say that we hope the objectors' case has not been downplayed because of either the Court's view or the fairness expert's view of the representation.

THE COURT: I would probably say it's been upplayed [78 because of your association.

MS. DUBOFSKY: Well, thank you.

THE COURT: Thank you. If there is such a word as upplayed.

I'd like to wind this up. I suppose I need to give you a chance to respond, Mr. Cogswell, to whatever has been said that you feel you need to respond to before I make my rulings.

MR. COGSWELL: I would just like to state for the record that Mr. Watson did arrive, your Honor, the class representative who wasn't here when we started, about 15 minutes after the hearing started.

THE COURT: Thanks for pointing that out.

MR. COGSWELL: And I don't feel I need to respond. I think you've heard enough.

I will also, though, reiterate that in my judgment there was absolutely no collusion at all. This was a hard-fought settlement, and I'll leave it at that.

THE COURT: Anything else before I make rulings?

I've already indicated that on the housekeeping matters, the motions to amend – actually, there is a

plaintiffs' amendment – will be treated as a motion to amend, will be granted.

Objectors' motion to reply is granted.

The Tidelands – I guess it's a motion for leave to [79] file a reply in support of Tidelands objections – is granted. All of those are housekeeping.

The Court has considered this case for a long time and intensively. I have read – I suppose I should say we have, because it's the Court and the Court's team, my very excellent law clerk, Beth Appleton. We have read the stacks of papers. It used to be that attorneys charged by the word. In this case it's by the inch or perhaps by the foot. But everything has been reviewed. There have been so many papers filed, there have been numerous motions filed. And this court is well satisfied that I've given this case as much attention and that there has been as much discussion of the issues as possible.

We all know that the papers are voluminous. You can just look at them to see that.

These issues, these concerns of the objectors, have been before this court for several months; and this has given the Court the necessary time, and the Court has used the time to address the objectors' concerns.

In light of the fact that the parties are settling or are attempting to settle this case, I am benefitted by the objectors' position in bringing a certain adversarial element back into the proceedings. This has caused an examination of the issues raised. And one of the big problems still appears to be the no-transportation claim under *Rogers* and the fact that the settlement releases it.

[80] This really, for the reasons argued this morning and previously, is not a great concern to the Court.

Despite the objectors' concerns here, I am well satisfied that this settlement should be finally approved as fair, reasonable, and adequate. And I've indicated yes, there is [sic] problems. And there is in every settlement. A settlement doesn't have to be 100 percent perfect. It has to be fair, reasonable, and adequate. And the four elements of the *Jones* case and the *Gottlieb* case need to be satisfied.

In this case, I have no question but that I am totally satisfied that the proposed settlement was indeed fairly and honestly negotiated. I am satisfied that there were indeed serious questions of law and fact – maybe are questions of law and fact – which place the ultimate outcome of this litigation in doubt.

I am satisfied, looking again at the four factors of *Gottlieb* and *Jones*, that the value of an immediate recovery outweighs the possibility of future relief after protracted and expensive litigation.

I am satisfied that the judgment of the parties and importantly the judgment of the fairness expert and, indeed, the magistrate judge that I have great respect for – is that this is a fair and reasonable settlement.

Now, it's important to note for the record that our fairness expert, Jim Lyons – and I've said this before and I [81] say it again: I hold Mr. Lyons in the highest regard – has not agreed with everything that plaintiffs propose. And this makes me happy and comfortable that there are some things that the fairness expert is suggesting.

I have stated and I now will indicate that I conclude – find and conclude that Mr. Lyons' position is the reasonable

position; and I will follow his suggestions concerning the two areas that he feels need modification, and they will be modified. So if necessary – and I think it will be necessary – the motion for approval of the plan administration and distribution will have to be modified by Mr. Lyons' suggestions.

I initially certified the classes conditionally. I will now certify the classes finally. So the classes will be certified. I will approve the settlement agreement. I will approve the allocation as modified. And I think we have some specific motions that I need to make rulings on and will.

The motion for – well, of course, I think the name of the motion – we need to get this down – Joint Motion for Final Approval of Class Action Settlement and Related Orders is granted. I've already said that I'm satisfied that the settlement is fair, reasonable, and adequate.

The plaintiffs' motion to amend the allocation order dated December 14, 2001, which was filed on April 4, will also be granted.

[82] Plaintiffs' motion to establish a compensation fund will be granted, unless it needs to be modified based on Mr. Lyons' suggestions. The 18,550 in that motion is appropriate. I am trying to remember the other figures covered, and I think that will be granted subject to the modification suggested by Mr. Lyons.

The motion for approval of attorneys' fees and other fees will be granted. Mr. Cogswell has suggested that he's going to give up a small amount of attorneys' fees so that – so that the named plaintiffs or the Coalition members can be considered named plaintiffs, and that will have to be calculated.

The plaintiffs' motion for approval of a plan of administration and distribution, which was filed March 11, 2002, is granted – and again, in principle, as modified by Mr. Lyons' suggestions.

So these – all these motions are granted in principle. The final figures might have to be tweaked, and you're going to give me those later, I hope.

Plaintiffs' motion to establish an administration fund is granted. And I've been told that no money will be spent without court approval. Is that what you told me, Mr. Cogswell?

MR. COGSWELL: Yes, that is correct.

THE COURT: Plaintiffs' motion to establish the [83] CO2 Committee – that motion was filed March 1, 2002 – will be granted.

And plaintiffs' motion for appointment of a claim arbitrator also will be granted.

I'm going to go over the findings and conclusions that are necessary to put this settlement into effect; and I assure the objectors that the language that they're concerned about on page 51, paragraph 118, will not be in the findings.

Okay. I misspoke. It was the class representatives who are to be treated as named plaintiffs, and the money to do this will be taken out of the attorneys' fees. Moneys will not be taken out of the part of the settlement going to the class. So I think we do have three – these two areas where the class will receive more money. The 1.2 million – and that's apparently a little bit less than $1.2 million.

The amount which was in Mr. Lyons' affidavit as $102,000, which after taxes is approximately 70-.

MR. COGSWELL: Attorneys' fees, your Honor, and costs.

THE COURT: Yes. After attorneys' fees and costs – is more like 70,000.

MR. COGSWELL: Yes.

THE COURT: Okay. And we'll have to have the final arithmetic done on that. So with those two modifications – I don't know which of those two these motions those modifications are going to affect. I know they will affect the motion for [84] approval of plan of administration and distribution, and they may affect a few other motions.

MR. COGSWELL: Yes. I've made a note, your Honor; and I think we understand the Court's intent.

THE COURT: Okay. The 1.2 million is going to be shifted, if I'm understanding the suggestion, from the named plaintiffs. Let me just review this again.

Yes. The suggestion – and I agree with it – is the 1.2 million additional going to the class will be shifted from the named plaintiffs. And the reason is because of the increased statutes-of-limitation risk faced by the named plaintiffs when compared to the Coalition. It should come out of the named plaintiffs' share, not the Coalition share.

Now, there are going to be further orders, and the Court will be available as we go along to modify some of these final figures. But the settlement now is approved,

and it's just a question of trying to get the final numbers on this.

Is there anything else that we – any other motions that you want me to rule on? I am well satisfied that the attorneys' fees are reasonable. And there are several other findings that will be incorporated that you suggested that the Court will approve.

MR. COGSWELL: Your Honor, just one thing. When you granted the joint motion for approval of the settlement, was it also the Court's intent to enter the judgments that are [85] attached to that joint motion today?

THE COURT: Well, you tell me what you think, Mr. Cogswell. You want this to be a Rule 54(b) judgment. And it would have to be, because there is a lot of loose ends that have to be tied up. And normally, we wait until the very end, and we do one universal judgment over the whole case. In this case, you think we should go ahead with 54(b).

MR. COGSWELL: This is by agreement, your Honor, because these proposed judgments are attached to the settlement agreement. And the reason is the defendants do not have to pay any money until we have a final judgment. And a final judgment is defined as one as to which all appeals have been run. And so the purpose of the final judgments attached to the joint motion as included in the settlements agreement were to get the main judgment of the fairness of the settlement recorded so that the appeal time starts.

THE COURT: I'm a little concerned about your caption. You have "Final Judgment and Order of Dismissal."

Now, you don't intend to dismiss this case. You intend to have a final judgment. I just wondered what –

MR. COGSWELL: The dismissal, I think, extends to the claims. The claims are dismissed. To the extent – The judgment is dismissing the claims, approving the settlement. If this were a final judgment, which we hope it will be some day, then they will pay the money within seven days and it's [86] distributed according to the orders of the Court.

THE COURT: It would seem to me once the money is paid and it's distributed, then we can clean up the matter by dismissing the case. But normally, you know, I always fundamentally tell new law clerks we either have a judgment for a certain amount or we have a dismissal. Can't have both.

MR. COGSWELL: Your Honor, normally if you have a judgment, it's a final judgment coming out of the trial court and it's subject to appeal and execution.

THE COURT: Right.

MR. COGSWELL: But this settlement agreement is not subject to execution until it's final through the appellate process. It's just by the agreement. It doesn't follow the normal rules, because the defendants did not want to be in the position of having to pay the $50 million and then have the thing reversed on appeal. So they insisted during the negotiations that the judgment forms be in this fashion and that the appeal period start. And it's not until the Tenth Circuit review is concluded that they have to pay the money. And in fact, the replies that have been filed by the objectors said they will appeal to the U.S. Supreme Court.

THE COURT: And that's why we have the 54(b) provision, and I understand that. But what I'm questioning is why it should say "Final Judgment and Order of Dismissal."

MR. COGSWELL: Well, the case is not being dismissed, [87] your Honor. Let's see. What does that say?

Well, it does say this dismisses this action and all claims, and I don't think –

THE COURT: You don't want to dismiss this action.

MR. COGSWELL: I think the defendants will agree with that.

THE COURT: Mr. McCollam, do you want to think about that a minute?

MR. M COLLAM: Judge, I think that perhaps the – that we can go off, look at the judgments. There are a couple of "subject to"s based on Mr. Lyons' recommendations. I thought where the Court was going was that the numbers are going to move a little bit when we redo his stuff.

But my basic answer to your question, Judge, would be this: I think that – and this is typical, as I understand it in class action practice. Where we are now is the Court's approved the settlements, and all of the necessary terms of the settlement are in the agreement; and basically, we're done.

THE COURT: I have done that.

MR. McCOLLAM: Right. And that is subject to appeal. And at least it's been promised that it will be appealed as a 54(b).

THE COURT: And we need a document, a 54(b), probably, document to be appealed.

MR. McCOLLAM: Right. Exactly.

[88] *THE COURT:* But should it say "Order of Dismissal"? Because you don't want to dismiss the case.

MR. McCOLLAM: I hear you, Judge; but obviously, there is another paragraph in there – I can't remember what the number is – that says this is subject to ongoing jurisdiction by the Court to administer – it's paragraph 10. "Without affecting the finality of the judgment in any way subject to the provisions of the settlement, the Court retains continuing jurisdiction over implementation allocation and disposition," etc.

So basically, what – and the dismissal, of course, is in essence contingent. It's subject to the resolution on appeal. I mean I don't think that we're in a situation where that judgment –

THE COURT: Here's my suggestion to you: Let's take "Order of Dismissal" out of the title and put in whatever you – however you want to use as the wording in one of the paragraphs of the final judgment.

MR. McCOLLAM: Okay, your Honor. We'll do that.

THE COURT: Can you work together and try to redo that?

MR. COGSWELL: Yes. Your Honor, I think by tomorrow we will submit that – some revised proposed forms of final judgment to accommodate the Court's concerns and ours, too, about dismissing the action.

[89] *THE COURT:* Yeah. You don't want this action dismissed.

MR. COGSWELL: Yes.

THE COURT: Absolutely not.

Okay.

MR. RATLIFF: Your Honor –

THE COURT: I have no problem with the 54(b) – yeah, do you have a suggestion?

MR. RATLIFF: Well, I recognize this is not the rule; but every one of these I've ever been in, once the settlement is approved and it is ready for appeal, the claims and the cause of action are dismissed subject to the appellate court saying "The settlement was improperly approved. We therefore reverse the judgment of approval and remand and order reinstatement on the docket."

THE COURT: So why not put that within the body of the judgment?

MR. RATLIFF: Sure. That can be done easily.

THE COURT: The claims and cause of actions will be dismissed or are dismissed subject to, and then put that as part of the language.

MR. RATLIFF: That's fine.

THE COURT: What I'm concerned about is when have a title saying "Order of Dismissal," our clerk's office erases the case. That's the end of it.

[90] *MR. RATLIFF:* I understand. I understand, your Honor.

THE COURT: So if you can get that language in there, I'll certainly approve it. And I have no problem with the 54(b).

Can you think of anything else that we need to do today? I know we're going to have a hearing that we have set in May. May 6, I believe.

MR. COGSWELL: Correct.

THE COURT: We'll be doing some follow-up orders at that time. Meanwhile, the appeal can start, the objectors can raise all the many issues they've raised before me in the Court of Appeals for the Tenth Circuit, and we'll see what happens.

Can you think – if you think of anything else, anybody, would you get the information to Beth Appleton, my very able law clerk, and she will get it to me or to Jeannette Gallardo, my courtroom deputy clerk.

There was a disc submitted to us. Are the judgments – and how many do we have? Three, four judgments?

MR. COGSWELL: Four. The judgments are not on the disc.

THE COURT: They're not on the disc.

MR. COGSWELL: What I propose is I'll meet with defense counsel. We'll get this revised, retyped, and get –

THE COURT: Could you put them on the disc? Because, for example, what I like in the very top, where it says, [91] "United States District Court, District of Colorado."

MR. COGSWELL: Yes.

THE COURT: Actually, its "In the United States District Court for the District of Colorado." The next line, the third line, should say, "Senior Judge Zita L. Weinshienk."

MR. COGSWELL: Okay.

THE COURT: And the signature block – signature block is correct. No problem.

MR. COGSWELL: We will get you the disc, your Honor, on these four judgments.

THE COURT: That would be helpful.

MR. COGSWELL: Which one – Rich Text or Microsoft Word?

THE COURT: Well, I have a favorite – let's see.

MR. COGSWELL: Nobody seems to have Word Perfect anymore.

THE COURT: Don't we have Word Perfect? We have, what, Word Perfect 9? I'm not the great expert on this that Beth is, so Word Perfect 9.

And what is the name of the font that I like, please.

THE LAW CLERK: It's Arial True Type, your Honor.

THE COURT: Arial what?

THE LAW CLERK: Arial True Type.

THE COURT: Nice and clean. It loose [sic] like printing, rather than typing. That's what I prefer, if you have it, if [92] you can do it.

MR. COGSWELL: We've got it.

THE COURT: What is it, 11?

THE LAW CLERK: 11.

THE COURT: Now, any other questions?

I want to say thank you to the plaintiffs, the defendants, especially to Mr. Lyons and his team.

I also want to say thank you to the objectors, because they've really raised many important issues for the Court to consider which I think will hopefully convince the appellate court that there has been a great deal of thought and effort by everybody concerned going into this settlements [sic]. It hasn't been just a rubber stamp. And I hope that some of the modifications that the Court has made today will indeed satisfy some of the objectors.

Is there anything else on the record?

If not, I'll be here; so let me have whatever problems arise if it can't wait till May 6, then.

Thank you very much. Court will be in recess.

(Recess at 11:55 a.m.)

* * *

[93] **REPORTER'S CERTIFICATE**

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Dated at Denver, Colorado, this 9th day of April, 2002

/s/ Paul A. Zuckerman
Paul A. Zuckerman